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No. _____

In the Supreme Court of the United States

WILLIAM D. MCCARTY, DAVID W. HADLEY, JUDITH G. RIPLEY, CAMIE J. SWANSON-HULL and DAVID W. ZIEGNER, in their official capacities as Commissioners of the Indiana Utility Regulatory Commission,
Petitioners,

v.

MIDWESTERN GAS TRANSMISSION COMPANY and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Younger v. Harris, 401 U.S. 37 (1971) , requires a federal court to abstain, absent "extraordinary circumstances," from enjoining an ongoing state judicial proceeding that involves an important state interest. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"), established that *Younger* applies with equal force when the federal constitutional defense is an alleged violation of the Supremacy Clause, *i.e.*, preemption. Under *NOPSI*, the state interest must be defined *broadly* and, for abstention not to apply, the alleged preemption must at least be *"flagrant and patent," i.e.*, indisputable. The questions presented are:

1. Whether the principles of *Younger* and *NOPSI* are directly violated when the appellate court mandates issuance of an injunction based on its preliminary view that the state law "seems" to be preempted, without even addressing the federal statute *expressly reserving* state authority over the supposedly preempted activity and without mentioning the flagrant-and-patent standard.

2. Whether a federal court defies the principles of *Younger* and *NOPSI* when it rejects abstention based on an appellate *assumption* that regulatory commissioners are prosecuting state proceedings to serve the commercial interests of a private utility, rather than the state interests in utility service they have sworn to uphold and that have been recognized as "vital" in over eighty years of Supreme Court precedent.

3. Whether this Court's precedents forbid creating an exception to *Younger* under which a federal court may enjoin ongoing state proceedings whenever a federal agency has won the race to *assert* jurisdiction, even where that jurisdiction may not exist.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below include plaintiff Midwestern Gas Transmission Company, defendants William D. McCarty, David W. Hadley, Judith G. Ripley, Camie J. Swanson-Hull and David W. Ziegner, each in his or her official capacity as a Commissioner of the Indiana Utility Regulatory Commission, and defendant Southern Indiana Gas and Electric Company.

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William D. McCarty, David W. Hadley, Judith G. Ripley, Camie J. Swanson-Hull and David W. Ziegner (the "Commissioners"), sued in their official capacities as Commissioners of the Indiana Utility Regulatory Commission (the "IURC"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 270 F.3d 536 (7th Cir. 2001), and is reproduced in App. A at 1a-8a. The opinion of the district court is reported at 120 F.Supp.2d 1155 (S.D. Ind. 2000), and is reproduced in App. B at 9a-67a.

JURISDICTION

The court of appeals entered its judgment on November 2, 2001. App. A, 1a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns abstention under *Younger v. Harris*, 401 U.S. 37 (1971), and involves these constitutional and statutory provisions:

The Supremacy Clause, Article VI, clause 2 of the Constitution, provides that "the Laws of the United States... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The federal Natural Gas Act (the "NGA") authorizes the Federal Energy Regulatory Commission ("FERC") to exercise jurisdiction, in relevant part, over "the transportation of natural gas in interstate commerce," but *not*

over "any other transportation or sale of natural gas," including "the local distribution of natural gas" or "the facilities used for such distribution." 15 U.S.C. § 717(b).

Indiana has long required a certificate of necessity from the IURC before a "gas utility" may render "gas distribution service" in Indiana. Ind. Code § 8-1-2-87(c). "Gas distribution service" means "the furnishing or sale of gas directly to any consumer within the state of Indiana for his or its domestic, commercial, or industrial use." Ind. Code § 8-1-2-87(a)(5). In 1985, Indiana also enacted statutes specifically addressing interstate pipeline companies that elect to enter the business of direct local gas distribution in Indiana. Indiana Code § 8-1-2-87.5(b)(1) requires a gas utility to "obtain a necessity certificate from the commission" before it may engage in the "transportation of gas from outside Indiana for direct . . . delivery to any end use consumer or consumers [in Indiana]."

STATEMENT

1. The Parties. Plaintiff Midwestern Gas Transmission Company ("Midwestern"), a "natural-gas company" under the NGA, 15 U.S.C. § 717a, owns an interstate gas pipeline which operates in four states, including Indiana, and is connected to the SIGECO distribution system. App. B, 14a. Midwestern contracted with two Indiana industrial gas consumers to provide both interstate transportation of gas and direct local delivery, the latter through distribution facilities built for this specific local purpose -- *i.e.*, not otherwise used for interstate transportation of gas. *Id.* at 12a. These two industrial consumers, Grain Processing Corporation ("GPC") and Scepter, Inc. ("Scepter"), purchase gas not from Midwestern, but from other sources outside Indiana. *Id.*

The IURC is an administrative body entrusted with interpretation and enforcement of Indiana utility laws. Ind. Code § 8-1-1-1. The Commissioners are appointed by the Governor of Indiana and each must take a written oath to "support and defend" the "laws of the State of Indiana." Ind. Code § 8-1-1-2.

The IURC has granted to Southern Indiana Gas and Electric Company ("SIGECO"), a local distribution company ("LDC"), a necessity certificate to sell and distribute natural gas solely *intra*state to end-use consumers in southwestern Indiana. MA 041; R. 34 at 4.[1] The facilities used by Midwestern to provide direct local gas delivery service to GPC and Scepter have been constructed within the geographic territory for which the IURC granted SIGECO a necessity certificate. App. B, 12a. An LDC must distribute gas to any customer within its territory who wishes to receive such service, even when the gas is purchased out of state and the LDC's role is limited to receiving gas from an interstate pipeline and providing local delivery service to the end user. The direct local delivery service by an interstate pipeline is often called a "bypass" of the LDC. Under Indiana law, the IURC may approve a bypass as an alternative to service by an LDC. The statutes do not express any preference for local delivery service by an LDC.

The IURC and its Commissioners are responsible for ensuring that public utilities in Indiana act in the "public interest" of the citizens of the State. Indiana Code § 8-1-2-115 mandates: "The commission shall inquire into any neglect or violation of the statutes of this state . . . by any

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[1] Record citations to materials not contained in petitioners' appendix are in the form used in the court of appeals and refer to sources available to respondents.

public utility . . . and it shall be its duty, to enforce" the statutes governing public utilities. Nothing is to "prevent[] the commission from instituting, prosecuting, hearing, or determining any investigation or proceeding which it is authorized to do, or make. . . ." Ind. Code § 8-1-1-5(d).

2. The IURC Proceedings. On June 11, 1998, the IURC began a proceeding targeting Midwestern's proposed local delivery service to GPC and Midwestern's failure to obtain a necessity certificate from the IURC. MA 091.[2]

Midwestern did not contest that it violated Indiana law. It moved to dismiss the IURC's proceedings on the ground that exclusive jurisdiction resided in FERC and that Indiana's authority to regulate direct local delivery service by pipelines, and the related distribution facilities, is preempted by the NGA. Midwestern initially asked the IURC to certify the jurisdictional issue to the Indiana Court of Appeals, but then withdrew that request when it obtained FERC approval in the permit proceedings described below. *Id.* Midwestern again moved the IURC to dismiss its proceedings in light of the permit it had obtained from FERC. The IURC denied that motion, but stayed further action while FERC considered petitions for rehearing and for reconsideration. MA 091-100.

The IURC has not closed or terminated its proceedings. As Midwestern acknowledged at the preliminary injunction hearing before the district court, the

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[2] In January 2000, two additional actions were initiated against Midwestern and Scepter, respectively, concerning Midwestern's local distribution of gas to Scepter and Scepter's construction and operation of intrastate transportation facilities for which no state approval was sought.

IURC remains "prepared to go forward" with those proceedings. SA 3-4.

3. The FERC Permit Proceedings. After privately contracting with GPC, Midwestern had filed, on May 12, 1998, a request that FERC approve its construction and operation of facilities for direct local gas distribution to GPC. *See In re Midwestern Gas Trans. Co.*, 85 FERC, ¶ 61,358 (Dec. 16, 1998). FERC issued an order providing the requested authorization to Midwestern. *Id.* Neither the IURC nor the Commissioners were parties to the FERC proceedings.[3]

4. The District Court Proceedings. In April 2000, Midwestern filed a complaint in the district court seeking to enjoin the ongoing IURC proceedings. The Commissioners moved to dismiss the complaint, arguing that *Younger* requires the district court to abstain and requires Midwestern to present to the IURC or the Indiana appellate courts any defense it has to the IURC's enforcement of state law. R. 35-36, 39-40. In November 2000, the district court dismissed the case, abstaining under *Younger*.

The district court held that the IURC proceedings satisfy each of the three requirements for *Younger* abstention. First, it found that the "state proceedings here plainly implicate important state interests, both generally in the regulation of natural gas and specifically in the regulation of bypass arrangements with industrial customers." App. B,

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[3] Midwestern filed on October 13, 1999, a request for FERC authorization for a connection to Scepter's intrastate transportation facilities. *See* 64 Fed. Reg. 57,635 (1999). Forty-five days later, Midwestern received automatic FERC authorization for that connection. *See* 18 C.F.R. § 157.205(i)(1). Again, neither the IURC nor the Commissioners were parties to this FERC proceeding.

26a. The district court relied on this Court's opinions in *General Motors Corp. v. Tracy*, 519 U.S. 278, 304-06 (1997) ("This Court has also recognized the importance of avoiding any jeopardy to service of the state-regulated captive market"), and in *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n,* 341 U.S. 329 (1951) ("*Panhandle-Michigan*") and *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Indiana*, 332 U.S. 507 (1947) ("*Panhandle-Indiana*") (both holding that states can exercise regulatory authority over bypass service, at least where a gas sale occurs with the local distribution service).

Second, the district court found that the IURC proceedings "are judicial in nature for purposes of *Younger* abstention." App. B, 30a. The district court noted that proceedings toward a permit or certificate of necessity, such as the Midwestern-GPC FERC proceeding, are generally "deemed legislative in nature," and that the "state enforcement proceedings" here are "judicial in nature" because they are "coercive," with the potential outcome being "appropriate penalties and enforcement mechanisms." *Id.* at 27a-30a.

Third, the district court observed that "state courts are fully capable of and responsible for interpreting and following the United States Constitution," *id.* at 30a, quoting this Court's statement in *Younger* that "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." 401 U.S. at 45. The district court concluded that even if the IURC did not decide Midwestern's constitutional defenses, the IURC's ability to certify such questions of law to the Indiana appellate courts affords Midwestern a fully adequate forum. App. B, 31a-32a.

Having found that "the basic elements of *Younger* abstention are present in this case," the district court considered Midwestern's argument that this case fits an exception to *Younger* because the Indiana statutes were alleged to be "flagrantly and patently" preempted by the NGA. *Id.* at 32a-35a. The district court noted that the NGA was enacted "only to exercise federal jurisdiction over those aspects of the industry that the Court itself had held were not subject to state regulation," *id.* at 36a, and that the *Panhandle* cases, decided post-NGA, "involved bypass arrangements in which the same entity both sold and transported the gas in question directly to industrial customers." *Id.* at 39a. The district court observed that "FERC has concluded that the holdings and reasoning of the *Panhandle* cases do not extend to an interstate pipeline's" direct local delivery "so long as the pipeline company itself did not also sell the gas" -- that this direct local delivery and the facilities constructed for it are "interstate commerce" and not "local distribution" under the NGA when a retail sale is absent. *Id.* at 39a-40a. However, the district court found this conclusion conflicts with *Tracy*, in which this Court recognized the states' "substantial" public health and safety interests in this context, apart from the effects of gas sales, and noted the "predictable and disastrous" results in earlier times when "competitors built parallel delivery systems and continually tore up streets to do so." *Id.* at 48a & n.8, citing *Tracy*, 519 U.S. at 289-90 & n.5.

The district court addressed opinions by the Sixth, Tenth and District of Columbia Circuit Courts of Appeals, which agreed with FERC, but found them to be both unpersuasive and based on differing or inconsistent reasoning. *Id.* at 41a-45a. It also cited this Court's footnote in *Tracy* recognizing the decisions of the three circuit courts and stating: "We express no view on the correctness of these

decisions." *Id.* at 53a-54a, quoting 519 U.S. at n.14. The district court held that "in deciding whether *Younger* abstention is appropriate," the issue is not the "debate over regulatory jurisdiction" but "only whether the result of that debate is so clear that any effort by the Indiana Commission to exercise jurisdiction . . . would be 'flagrantly and patently' unconstitutional. . . . [T]hat question is easy to answer, and the answer is no." *Id.* at 59a.

5. The Court of Appeals' Decision. The Seventh Circuit reversed. It described section 1(b) of the NGA as meaning simply that FERC's "jurisdiction to regulate the interstate transportation of natural gas . . . is exclusive; state regulation is preempted." App. A, 4a. The court failed to address the NGA's express reservation of the states' regulatory power over "local distribution" of gas and over the "facilities" used for such distribution. It also disregarded this Court's analysis in the *Panhandle* cases and other cases holding that this power was reserved to the states even though it governs a portion of interstate transportation. *See, e.g., Panhandle-Michigan*, 341 U.S. at 333-34. The Seventh Circuit did not analyze or discuss the opinions on preemption by the Sixth, Tenth or District of Columbia Circuits, but cited them and said it "seems to us" these circuits were correct. App. A, 4a.

Later in its opinion, the court of appeals added that "the state here is not asserting a state interest; it is trying to take control of the interstate market in natural gas." *Id.* at 7a. The court said it could "see" the lack of state interest "more clearly" by examining SIGECO's presumed commercial motives for seeking state regulation, and accused the Commissioners of serving as SIGECO's tool "to limit interstate competition in the sale of natural gas." App. A, 7a.

The Seventh Circuit also declared that *Younger* "has no application to a case such as this" because there can be "no affront" to the states when "valid federal law has created a federal forum for the determination of issues that the state proceeding would be able to consider" and the "federal forum determines those issues" first. *Id.* at 3a. The court concluded that under its ruling any "disputant" -- which Midwestern asserts includes the Commissioners -- must "make his arguments in the first authorized forum to become seised of [the] dispute." *Id.* at 5a. The court did not mention that in disputes arising from a bypass situation, the first filing (by the pipeline company) will routinely be with FERC. Nor did the court state any legal theory under which the FERC proceeding, to which the IURC Commissioners were not parties, could bind the Commissioners or displace Indiana's ability to enforce its laws.

REASONS FOR GRANTING THE WRIT

I. The Opinion Below Directly Conflicts With *Younger* And *NOPSI*.

In *NOPSI*, this Court considered the application of *Younger* to a utility's request to enjoin a state court's review of state regulatory action that the utility claimed was preempted by the NGA. Two key principles of *NOPSI* are involved here:

First, *NOPSI* directs federal courts considering *Younger* abstention to focus on "the importance of the generic proceedings to the State," and *not* on the state's "interest in the *outcome* of the particular case." 491 U.S. at 365 (original emphasis). As an example, the Court said the relevant interest in *Younger* was not California's interest in prohibiting John Harris from distributing handbills, but that state's broader interest in enforcing its criminal laws. *Id.*

Second, the Court in *NOPSI* confirmed that a state enforcement action alleged to be *preempted* by federal law is on equal footing with state action alleged to violate any other constitutional guarantee. *Id.* Thus, the Court explicitly *rejected* the plaintiff's suggestion that "a district court presented with a preemption-based request for equitable relief should take a quick look at the merits; and if upon that look the claim appears substantial, the court should endeavor to resolve it." *Id.* at 364. The Court allowed only that "[p]erhaps" a "facially conclusive" claim that the underlying state proceeding is "flagrantly and patently violative of federal pre-emption" would establish irreparable injury and justify an exception to *Younger* abstention. *Id.* at 366-67.

A. The court of appeals' decision defies *NOPSI*'s requirement that the state interest be defined broadly, and substitutes its unsupported view of improper motive for the particular proceedings.

Defined in the broad terms counseled by this Court, the State's interest in the ongoing IURC proceedings is protecting the public health and welfare by enforcing state laws governing gas distribution to end users. As the Court stated in *NOPSI*, the "regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Id.* at 365, quoting *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). *See also* Part II below. Under the correct standard, the legitimacy of Indiana's interest is beyond doubt.

Completely abandoning this doctrine of broad construction, the Seventh Circuit based its ruling on the narrow interest it perceived to be underlying the *particular* IURC proceedings Midwestern seeks to enjoin. Even more troubling, the court of appeals did not examine the *State's*

interest at all; it speculated about the presumed "interest" of the utility that reported the violations to the IURC: "SIGECO is seeking to enlist the State of Indiana in an effort to limit interstate competition in the sale of natural gas, specifically an effort to compel users of gas in SIGECO's market area to buy from a supplier contractually linked to SIGECO." App. A, 7a. This distorts the *Younger* analysis, and is factually incorrect. The district court noted the *undisputed* fact that "Midwestern's pipeline is also connected to the SIGECO distribution system," App. B, 14a, but the court of appeals declared that SIGECO did *not* receive gas from Midwestern and, with this error as its foundation, hypothesized that "[i]f SIGECO can persuade the Indiana commission to forbid Midwestern to deliver the gas, these purchasers will have to rescind their purchases and instead buy from an affiliate of one of the pipelines with which SIGECO has a contract." App. A, 7a. This imaginary motive is the stated basis of the Seventh Circuit's concern that the IURC is attempting to interfere with a national market for the *sale* of natural gas, from which the court indicts the IURC proceedings as being "vexatious" and "harassing." App. B, 6a, 8a. The court's analysis illustrates the dangers of allowing a court faced with a *Younger* abstention question to resolve the merits of preemption on a "quick look" before deciding whether to abstain.[4]

NOPSI forbids narrowly defining the State's interest in requiring application for a certificate of necessity by a pipeline that seeks to engage in local distribution activities. *NOPSI certainly* prohibits a court of appeals' rejection of *Younger* based on spurious accusations that state regulatory

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[4] The district court expressly found "no evidence of harassment or bad faith on the part of SIGECO, let alone the Indiana Commissioners." App. B, 33a.

Commissioners have abandoned their sworn duties to assist in obstruction of interstate commerce.

B. The Seventh Circuit's "seems preempted" exception would consume the rule and defeat the purposes of *Younger*.

NOPSI does not foreclose the possibility ("perhaps") of an exception to *Younger* in cases where the plaintiff can establish irreparable injury through a "facially conclusive" claim that the challenged state action or statute is "flagrantly and patently" unconstitutional (*i.e.*, in preemption cases, "flagrantly and patently" in conflict with a federal law). Ignoring this Court's careful efforts to limit the scope of such an exception, and compounding a problem that has arisen in other circuits, the Seventh Circuit has virtually eliminated *Younger* abstention in preemption cases.

1. The "seems to us" exception for preemption claims

The court of appeals' analysis of the preemption issue was limited to the following:

> The Natural Gas Act grants [FERC] jurisdiction to regulate the interstate transportation of natural gas, and the Supreme Court has held that [FERC's] jurisdiction is exclusive; state regulation is preempted. *It seems to us*, as it has seemed to the other courts to have addressed the issue, that the transportation of natural gas bought and produced out of state to Indiana residents via Midwestern's pipeline is interstate transportation rather than being intrastate

> transportation from, as it were, the purchasers to themselves.[5]

App.A, 4a (citations omitted) (emphasis supplied). Thus, the court of appeals adopted precisely the approach the Court rejected in *NOPSI*, 491 U.S. at 364-65: it took a "quick look at the merits" and "endeavor[ed] to resolve" the underlying preemption issue, rather than abstaining for resolution of this issue through state channels. This approach is a direct affront to state sovereignty.

2. The Seventh Circuit's expansion of other circuits' assault on the "flagrantly and patently" unconstitutional exception

Some courts have failed to recognize the subtle but crucial distinction between a litigant's *assertion* of "facial" or "clear" preemption and a "facially conclusive" showing that a state law or state agency action is "flagrantly and patently" preempted.[6] These opinions, now joined by the Seventh

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[5] The court of appeals also implied that Indiana's regulation might be preempted under the Natural Gas Policy Act of 1978 and/or the Natural Gas Wellhead Decontrol Act of 1989, both codified at 15 U.S.C. § 3301 *et seq*. These statutes deregulated *wellhead sales* of natural gas and do not affect state authority to regulate retail delivery of that commodity to the end-use consumer.

[6] The Fifth Circuit recognized and respected this distinction on remand of the *NOPSI* case, as ordered by this Court because it found abstention was not required where the state action was legislative. The Fifth Circuit noted that this Court "held only that the order was not 'flagrantly' unlawful for *Younger* abstention purposes" and that the question of whether the law was "facially" preempted remained undecided. 911 F.2d 993, 999 (5th Cir. 1990).

Circuit,[7] have diluted the *Younger* abstention doctrine in direct contravention of *NOPSI*. For example, the Third Circuit recently cited *NOPSI* for the proposition that when considering abstention the federal court's "focus" should be "on the *nature* of that claim. . . . abstention is inappropriate when a federal plaintiff asserts a preemption/Supremacy Clause claim." *Chiropractic Am. v. Lavecchia*, 180 F.3d 99, 108 (3d Cir. 1999) (original emphasis). The Sixth Circuit watered down *NOPSI*'s admonition that "what requires further factual inquiry can hardly be deemed 'flagrantly' unlawful for purposes of a threshold abstention determination," 491 U.S. at 367, when it interpreted *NOPSI* as suggesting that a federal court could avoid abstaining under *Younger* so long as no *factual findings* were required. *Norfolk & Western Ry. v. Pub. Utilities Comm'n of Ohio*, 926 F.2d 567, 573 (6th Cir. 1991). The First Circuit has noted that "[a] number of courts have held that *Younger* abstention is inappropriate where a claim of preemption is 'facially conclusive' or *'readily apparent.'*" *Chaulk Serv., Inc. v. Mass. Comm'n Against Discrimination*, 70 F.3d 1361, 1370 (1st Cir. 1995) (emphasis supplied). The Seventh Circuit has now lowered the bar to "seems preempted."

3. The Commissioners' actions are not "flagrantly" or "patently" preempted.

If this Court had invalidated a statute substantially similar to Ind. Code §8-1-2-87.5(b)(1), the IURC's proceedings might be "flagrantly and patently"

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[7] In *Younger*, the Court cautioned that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." 401 U.S. at 54. The Seventh Circuit's language demonstrates only that, in its opinion, the Indiana statute at issue is unconstitutional "on its face."

unconstitutional. If Congress had defined "local distribution" to *exclude* an interstate pipeline's direct delivery of natural gas to an end-use consumer as part of a retail transaction, Ind. Code §8-1-2-87.5(b)(1) might be "flagrantly and patently" unconstitutional. Beyond those circumstances of express, controlling authority, the alleged preemption should be blatant, undebatable, and such that no reasonable judge could disagree that Congress has preempted state authority. This is not such a case.

The Seventh Circuit's truncated disposition of the underlying preemption issue relies upon, and merely states general agreement with, the opinions of three other courts of appeals.[8] These three circuits are in conflict with precedent of this Court, and are so in conflict with one another that the Seventh Circuit cannot agree with them all. For example, the District of Columbia Circuit, in *Pub. Utilities Comm'n of California v. FERC*, 900 F.2d 269, 275-76 (D.C. Cir. 1990), refused to find that the Congressional grant of state jurisdiction over "local distribution" was "an independent limit on the grant of [FERC's] 'interstate transportation' jurisdiction," 900 F.2d at 275-76, despite this Court's recognition that states have regulatory authority over the final stage of natural gas transactions "*in interstate commerce*" because the activities regulated are "essentially local" and the regulation is necessary to protect important local or state interests. *Pennsylvania Gas Co. v. Pub. Serv. Comm'n*, 252

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[8] In *Tracy*, this Court acknowledged these circuit court opinions but "express[ed] no view on the correctness of these decisions." 519 U.S. at 306 n.14. Certainly the agreement (in result) of three or four circuits does not make the issue "clear"; this Court could, when squarely faced with this preemption issue, decide contrary to the heretofore unanimous courts of appeals. *See, e.g., Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 121 S.Ct. 1835 (2001) (overturning the holdings of at least eight circuits).

U.S. 23, 28-30 (1920); *Panhandle-Indiana*, 332 U.S. at 522; *Panhandle-Michigan*, 341 U.S. at 333-34. The Tenth Circuit, on the other hand, acknowledged that Supreme Court precedent authorizes state regulation over portions of interstate commerce, stating "we cannot end our inquiry simply by recognizing that the matter involves transportation in interstate commerce."[9] *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1417 (10th Cir. 1992). The District of Columbia Circuit also employed a mechanical "pressure test" for determining where "local distribution" begins, but that test was rejected by its Tenth Circuit counterpart, which declared, instead, that to perform "local distribution" the transporting entity must also be involved in the retail sale of the gas. *Compare* 900 F.2d 277 *with* 955 F.2d at 1420-21.

The Seventh Circuit does not adopt any of the tests proposed by the other circuit courts. In fact, the opinion below does not even mention the key disputed statutory term "local distribution."[10]

In contrast, the district court reviewed this Court's precedents upholding state regulation of "bypass arrangements in which the same entity both sold and transported the gas in question directly to industrial customers." App. B, 39a, citing *Panhandle-Indiana* and *Panhandle-Michigan*. It

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[9] This is precisely where the Seventh Circuit ended its inquiry. *See* App. A, 4a and Part I(B)(1), *supra*.

[10] The Sixth Circuit, in *Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989), at least addresses this provision before concluding that the pipeline's role in a bypass is "simply to transport [natural gas] from one state to another across several intervening states." It also ignored the key issue of the pipeline's direct delivery of the gas to an end-use consumer, in determining that the service at issue was not "local distribution."

reasoned that "the states' interests in regulating bypass arrangements . . . are not affected at all by a legal separation between the seller and the transporter." *Id.* at 47a. It found the Sixth, Tenth and District of Columbia Circuit opinions to be unpersuasive and based on inconsistent reasoning. *Id.* at 41a - 45a. Then, citing the words and purposes of *Younger*, the district court held: "The issue presented by Midwestern's argument is only whether the result of [the preemption] debate is so clear that any effort by the Indiana Commission to exercise jurisdiction over Midwestern's bypass arrangements with GPC and Scepter would be 'flagrantly and patently' unconstitutional . . . . [T]he answer is no." *Id.* at 59a.

II. The Seventh Circuit's Opinion Eviscerates Important State Interests This Court Has Recognized Repeatedly For More Than Eighty Years.

The Seventh Circuit's assertions that there can be "no state interest" in enforcing Indiana law inescapably contradict the wealth of Supreme Court precedent, in decisions from 1920 through 1997, recognizing the important state interests at stake in the regulation of utilities' local delivery service to end-use consumers, both residential and industrial. FERC is not responsible for the health and safety of local residents if the new facilities built by Midwestern (or Scepter) explode or leak. Similarly, local land use issues must not be subject to exclusive federal jurisdiction. FERC will not answer to Indiana voters unhappy about the unnecessary disruption caused by the installation of parallel natural gas delivery facilities. FERC will not assist the economically disadvantaged Indiana retail ratepayers. Indiana, and the Commissioners, must.

Before the NGA was enacted, in *Pennsylvania Gas*, 252 U.S. at 28, 30-31, the Court explained that state

regulation of local gas delivery service is "needed to protect or regulate matters of local interest" and that the "thing which the state commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers." In *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298, 309 (1924), the Court determined, "The business of supplying, on demand, local consumers is a local business, *even though the gas be brought from another state and drawn for distribution directly from interstate mains.*" (emphasis supplied).

When Congress enacted the NGA, it "was meticulous to take in only territory which this Court had held the states could not reach." *Panhandle-Michigan*, 341 U.S. at 335. After enactment of the NGA, the Court upheld the authority of a state commission to regulate an interstate pipeline's delivery service to an end-use consumer and described such service as an "'essentially local' concern and of vital interest to the State." *Panhandle-Michigan*, 341 U.S. at 334. In *Panhandle-Michigan*, the Court "emphasize[d] the need for local regulation" based on an interstate pipeline's proposed use of local streets and alleys and the impact on local utilities and consumers. *Id.* at 333. Similarly, the Court recognized in *Panhandle-Indiana* that "the state's regulatory system would be crippled and the efforts of the Indiana Commission seriously hampered" if these local regulatory interests were not recognized. 332 U.S. at 522.

This Court recently reiterated the crucial state interests supporting regulation of the local aspects of natural gas service to end users, *while expressly recognizing* the new "unbundled" competitive natural gas market in which industrial end users "buy natural gas from producers or independent marketers, pay interstate pipelines for interstate transportation, and pay LDCs for local transportation." *Tracy*, 519 U.S. at 284. The Court explained that the need

for state regulation was "learned from chastening experience that public streets could not be continually torn up to lay competitors' pipes," and " that investments in parallel delivery systems for different fractions of a local market would limit the value to consumers of any price competition." *Id.* at 290. The Court noted that Congress' enactment of the NGA "was an unequivocal recognition of the vital interests of the states and their people, consumers and industry alike, in the regulation of rates *and service.*" *Id.* at 292. In fact, the Court in *Tracy* expressly acknowledged that the case before it -- in an "unbundled" context -- presented "circumstances remarkably similar" to those it had considered in *Panhandle-Michigan. Id.* at 305. The states' interests in the direct delivery of natural gas to end-use consumers are no less vital when the sale of gas is structured to occur in another state.

III. The Seventh Circuit's Erroneous Judgment Directly Invites Federal Agencies To Invade State Sovereignty And Will Have Broad And Recurring Harmful Effects.

In place of this Court's longstanding mandate that federal courts "restrain their authority because of 'scrupulous regard for the rightful independence of the state governments,'" *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500-01 (1941), the Seventh Circuit's judgment substitutes a policy of cavalier disregard for states' interests. In addition to its lax "seems preempted" standard and its second-guessing of presumed motive in the *particular* case, the court of appeals' opinion would sweep away the rights of state courts and agencies to decide the constitutionality of state laws whenever (1) there is a dispute as to the scope of federal and state regulatory authorities' jurisdiction over an activity; and (2) a federal agency claims jurisdiction when it becomes first "seised" of the dispute through a routine certification proceeding to which the state is *not* a party. The court of

appeals flatly declares that *Younger* "has no application" when the context is "dual federal-state jurisdiction over an activity" *no matter what powers Congress has reserved to the states*. Such an unsound rule would destroy the balance between federal and state authority in numerous contexts:

(a) The Seventh Circuit's "first filing" test would effectively displace and invalidate state laws with *no opportunity* for a state agency *or state courts* to decide the jurisdictional or constitutional issues. In cases such as this, FERC will virtually always receive the first filing because the context is a private deal struck by the pipeline, and FERC offers nearly routine approval with little or no consideration of local effects. As the district court held, there is "no support" for the "bold assertion that, in the dual federal-state system of regulating the natural gas business, state regulators must either intervene before FERC or passively and quietly accept FERC's decisions." App. B, 66a. Yet this is precisely what the Seventh Circuit's judgment requires.

(b) The race to the courthouse or agency door can no more grant jurisdiction to the first "seised" agency than such an agency could grant jurisdiction to itself. A federal "agency literally has *no power to act, let alone preempt the validly enacted legislation of a sovereign State*, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 373-74 (1986) (emphasis supplied). Certainly "an agency may not confer power upon itself" or "override" a "congressional *denial* of power" over intrastate or local service matters. *Id.* at 374-75.

(c) Last year this Court reversed the Seventh Circuit in *Solid Waste Agency of North Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172 (2001), and warned that state sovereignty must not be diminished by ignoring or minimizing federal statutory terms that define the

jurisdictional boundary. This Court expressed "heightened" concern for situations where an "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173. Yet here the Seventh Circuit has read Congress' "local distribution" reservation out of the NGA.

(d) Unless the IURC or the State of Indiana becomes a party to a dispute, neither the decisions of FERC nor the decisions of federal courts are binding upon them. *See Indiana Dep't of Pub. Welfare v. Payne*, 622 N.E.2d 461, 468 (Ind. 1993) ("Although U.S. Supreme Court decisions pertaining to federal questions are binding on state courts, lower federal court decisions" have "non-binding authority on state courts."). In other opinions, the Seventh Circuit has recognized that until the "Supreme Court of the United States has spoken, state courts are *not precluded from exercising their own judgment upon questions of federal law.*" *United States v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970). (emphasis supplied); *see also Freeman v. Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992). In this case it wrongly deprives state courts of the opportunity even to *consider* the federal constitutional validity of state laws.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-4340

[Filed November 2, 2001]

Midwestern Gas Transmission Company, *Plaintiff-Appellant*,	)
v.	)
William D. McCarty, et al., *Defendants-Appellees*.	)

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division
No. 00 C 592
David F. Hamilton, Judge

JUDGES:
Before Posner, Ripple, and Kanne, Circuit Judges.

OPINION

Posner, *Circuit Judge*.

This is a suit by an interstate natural-gas pipeline, Midwestern, to enjoin the Southern Indiana Gas and Electric Company (SIGECO) from prosecuting an action before the Indiana Utility Regulatory Commission (IURC) and the Commission from entertaining the action. SIGECO seeks in that action a ruling that Midwestern must, pursuant to Ind. Code §§8-1-2-87, 87.5, obtain IURC's permission to connect its pipeline to two industrial users of gas in Indiana who purchased their gas from out of state sellers other than Midwestern but seek delivery of the gas from Midwestern, which has a pipeline close to these users. The Federal Energy Regulatory Commission (FERC) had approved the connection upon application by Midwestern in a proceeding that began prior to the proceeding initiated by SIGECO before the Indiana commission, which in fact had stayed its proceeding to await the outcome of the proceeding before FERC.

The ground of Midwestern's suit was that the Natural Gas Act preempts the state regulatory law on which SIGECO has based its action before the Indiana commission. The district court dismissed the suit, ruling that the Younger doctrine (on which *see, e.g., Younger v. Harris*, 401 U.S. 37, 43-53, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971); *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 364-70, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989); *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 557-60 (7th Cir. 1986)) required Midwestern, if it wanted to argue preemption, to argue it as a defense in the proceeding before the state commission.

Younger holds that federal courts are not to use their equity powers to enjoin proceedings in state courts or (*see Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 626-27, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986)) administrative agencies merely because the person seeking the injunction has a federal defense to the state proceeding. States oughtn't to be impeded in their efforts to enforce their own laws in their own courts and administrative agencies by injunctions issued at the behest of defendants in state proceedings who, seeking to delay and if possible derail those proceedings in mid-course, run to a federal court for an injunction against the continuation of the proceeding. *Hoover v. Wagner*, 47 F.3d 845, 848 (7th Cir. 1995); *Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 8 F.3d 953, 957 (3d Cir. 1993); *Champion International Corp. v. Brown*, 731 F.2d 1406, 1408 (9th Cir. 1984). The policy has no application to a case such as this, in which, because of dual federal-state jurisdiction over an activity, here the sale and distribution of natural gas, a federal proceeding (here before the Federal Energy Regulatory Commission) overlapping the state proceeding reaches completion while the state proceeding is still pending at an early stage. There is no affront to the state's prerogative of enforcing its own laws when valid federal law has created a federal forum for the determination of issues that the state proceeding would be able to consider and the proceeding in the federal forum determines those issues before the counterpart state forum is ready to do so. "Principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court." *Town of Lockport v. Citizens for Community Action at Local Level, Inc.*, 430 U.S. 259, 264 n. 8, 51 L. Ed. 2d 313, 97 S. Ct. 1047 (1977); *see also Montclair*

Parkowners Ass'n v. City of Montclair, 264 F.3d 829, 830-31 (9th Cir. 2001); *Polykoff v. Collins*, 816 F.2d 1326, 1332-33 (9th Cir. 1987); *Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534, 542-43 (9th Cir. 1985).

The Natural Gas Act grants the Federal Energy Regulatory Commission jurisdiction to regulate the interstate transportation of natural gas, 15 U.S.C. §717(b), and the Supreme Court has held that the Commission's jurisdiction is exclusive; state regulation is preempted. *Northwest Central Pipeline Corp. v. State Corporation Comm'n*, 489 U.S. 493, 506-07, 103 L. Ed. 2d 509, 109 S. Ct. 1262 (1989); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01, 99 L. Ed. 2d 316, 108 S. Ct. 1145 (1988); *see also Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1421 (10th Cir. 1992). It seems to us, as it has seemed to the other courts to have addressed the issue, *see id.* at 1418-19; *Public Utilities Comm'n v. FERC*, 283 U.S. App. D.C. 285, 900 F.2d 269, 276-77 (D.C. Cir. 1990); *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295,1300 (6th Cir. 1989), that the transportation of natural gas bought and produced out of state to Indiana residents via Midwestern's pipeline is interstate transportation rather than being intrastate transportation from, as it were, the purchasers to themselves. It is via the pipeline that gas is brought from out-of-state producers to Indiana residents. Midwestern was therefore required to obtain, and so sought and did obtain, FERC's authorization to build the lines necessary to connect its pipeline to the premises of the buyers. *See* 15 U.S.C. § 717f(c); 18 C.F.R. §157; *Northwest Central Pipeline Corp. v. State Corporation Comm'n, supra*, 489 U.S. at 520.

SIGECO, which would like to be the supplier of these buyers, was entitled to participate as a party in the FERC proceeding. 15 U.S.C. §717f(c)(1)(B); 18 C.F.R. §157.10; *United Gas Pipe Line Co. v. McCombs*, 442 U.S. 529, 538, 61 L. Ed. 2d 54, 99 S. Ct. 2461 (1979). As a party, litigating under a broad public convenience and necessity standard, it could make a wide range of arguments against the grant of permission to Midwestern to build the spur to the users--such arguments as that a pipeline with which SIGECO has a contract is nearer to the buyers (five thousand feet versus three miles) and that therefore less construction of new distribution lines, with possible adverse environmental consequences, would be necessary. *Midcoast Interstate Transmission, Inc. v. FERC*, 339 U.S. App. D.C. 213, 198 F.3d 960, 967-68 (D.C. Cir. 2000). SIGECO made a number of such arguments, which were rejected, setting the stage for a collateral estoppel argument by Midwestern that we'll not have to consider. SIGECO could have made every one of the arguments that it seeks to make (and that Midwestern seeks to enjoin it from making) in the proceeding before the Indiana commission, which SIGECO contends has the authority, by virtue of the two provisions of the Indiana Code that we cited earlier, which indeed require IURC's permission to hook up a pipeline within the state to a purchaser within the state, to forbid Midwestern to connect to the two users even though FERC has authorized it to do so.

Whether or not a state has some residual authority to block a connection authorized by FERC (dual federal-state authority to deny needed permits is of course common), we cannot see how the Younger doctrine is impaired by forcing a disputant to make his arguments in the first authorized forum to become seised of his dispute, just because that forum

may be federal and a state proceeding may be stacked, as it were, behind it. Indeed, there is a peculiar perversity in SIGECO's invocation of the *Younger* doctrine. It is a doctrine that channels all proceedings into a single forum, the state court or agency, *see Hickey v. Duffy*, 827 F.2d 234, 239 (7th Cir. 1987); *Waldron v. McAtee*, 723 F.2d 1348, 1357 (7th Cir. 1983); *Ballard v. Wilson*, 856 F.2d 1568, 1570 (5th Cir. 1988), whereas SIGECO is arguing for using the doctrine to split the proceedings between federal and state agencies. The injunction sought by Midwestern merely seeks to prevent vexatious litigation by a disappointed party, namely SIGECO, in the federal regulatory proceeding.

There is more that is wrong with invocation of the *Younger* doctrine in this case. The doctrine presupposes that the state has a valid interest that it is seeking to enforce, even if there may be objections based on federal law to a particular enforcement proceeding. For example, no one doubts that a state has a valid interest in enforcing the ethical rules governing the behavior of lawyers in the state's courts, though in a particular case there might be a valid federal defense--the proceeding might violate due process or some other federal right. If the state does not have such an interest, if for example it is seeking to regulate activities that clearly are under exclusive federal control, then there is no basis for invoking *Younger*. *See Chaulk Services, Inc. v. Massachusetts Comm'n Against Discrimination*, 70 F.3d 1361, 1370 (1st Cir. 1995), and cases cited there; *Norfolk & Western Ry. v. Public Utilities Comm'n of Ohio*, 926 F.2d 567, 573 (6th Cir. 1991). This is not to say that a defense of federal preemption automatically defeats *Younger*, the position rejected in *New Orleans Public Service, Inc. v. Council of City of New Orleans, supra*, 491 U.S. at 364-67. That would be question-

begging. The state court has the same right and power to decide a defense of preemption as it does to decide any other federal defense. But the state here is not asserting a state interest; it is trying to take control of the interstate market in natural gas. There just is no way in which forcing Midwestern to obtain IURC's permission to deliver gas to these Indiana purchasers from out of state can be thought to advance a legitimate state interest. Mere defiance of clear federal law removing an area from potential state regulation is not such an interest.

We can see this more clearly by asking just what SIGECO's "interest" in the case is--why it wants to block Midwestern from delivering gas to these Indiana establishments. SIGECO is a local gas distribution company that has contracts with several pipelines, not including Midwestern. The pipelines do not sell gas themselves, they merely transport it, but they have affiliates that sell the gas they transport. The affiliates of the pipelines that supply SIGECO are in competition with the gas companies that sold the gas to the two Indiana purchasers who want Midwestern to deliver it to them. If SIGECO can persuade the Indiana commission to forbid Midwestern to deliver the gas, these purchasers will have to rescind their purchases and instead buy from an affiliate of one of the pipelines with which SIGECO has a contract; in that event SIGECO will make the connection between the pipeline and the customer's premises and obtain a fee for doing so. In other words, SIGECO is seeking to enlist the State of Indiana in an effort to limit interstate competition in the sale of natural gas, specifically an effort to compel users of gas in SIGECO's market area to buy from a supplier contractually linked to SIGECO. SIGECO wants to charge a toll to anyone who sells gas in its service

area.

But Congress and FERC have ordained, the former in deregulatory amendments to the Natural Gas Act and the latter in a host of implementing regulations, that there shall be a nationwide competitive market in the sale of natural gas. *See* Natural Gas Policy Act of 1978, Pub. L. No. 95-621; Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, both codified at 15 U.S.C. §3301 et seq.; Department of Energy, Federal Energy Regulatory Commission, Order No. 636, 57 Fed. Reg. 13267, 13268-69 (1992); Department of Energy, Federal Energy Regulatory Commission, Order No. 436, 50 Fed. Reg. 42408, 42411 (1985); *General Motors Corp. v. Tracy*, 519 U.S. 278, 283-84 (1997); Richard J. Pierce, Jr., "The Evolution of Natural Gas Regulatory Policy," 10 Natural Resources & Environment 53, 54-55 (Summer 1995); Michael J. Doane & Daniel F. Spulber, "Open Access and the Evolution of the U.S. Spot Market for Natural Gas," 37 J. Law & Econ. 477 (1994). It was pursuant to this federal policy that Midwestern was authorized by FERC to deliver the gas ordered from out of state by Indiana purchasers. SIGECO must be enjoined from harassing the purchasers and Midwestern by pursuing a state regulatory proceeding aimed at undoing the results of a federal regulatory proceeding.

The judgment denying the relief sought by Midwestern is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.

Reversed and Remanded.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

CAUSE NO. IP 00-592-C H/G

[Filed, November 13, 2000]

MIDWESTERN GAS TRANSMISSION COMPANY, a Delaware corporation, *Plaintiff*,	)
v.	)
WILLIAM D. MCCARTY, in his capacity as Commissioner of the Indiana Utility Regulatory Commission; DAVID A. HADLEY, in his capacity as Commissioner of the Indiana Utility Regulatory Commission; JUDITH G. RIPLEY, in her capacity as Commissioner of the Indiana Utility Regulatory Commission; CAMIE J. SWANSON-HULL, in her capacity as Commissioner of the Indiana Utility Regulatory Commission; DAVID E. ZIEGNER, in his capacity as Commissioner of the Indiana Utility Regulatory Commission; and SOUTHERN INDIANA GAS AND ELECTRIC, COMPANY, an Indiana corporation, *Defendants*.	)

JUDGES:
DAVID F. HAMILTON, JUDGE, United States District Court, Southern District of Indiana.

OPINION

ENTRY ON ALL PENDING MOTIONS

Introduction

The Federal Natural Gas Act authorizes the Federal Energy Regulatory Commission (FERC) to exercise jurisdiction, in relevant part, over "the transportation of natural gas in interstate commerce," but not over "any other transportation . . . of natural gas or . . . the local distribution of natural gas . . . ." 15 U.S.C. §717(b). Local distribution of natural gas is left to state regulation. Companies engaged in the interstate gas business have long sought to avoid state regulation of so-called "bypass" arrangements in which the interstate business bypasses a local gas distribution company and supplies gas directly to large industrial customers. Compare, *e.g., Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329, 333, 95 L. Ed. 993, 71 S. Ct. 777 (1951) (holding that state could exercise jurisdiction over such bypass arrangements, at least where same entity both sold and transported gas to end user), with *Federal Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621, 632, 638, 32 L. Ed. 2d 369, 92 S. Ct. 1827 (1972) (holding that federal commission had power to issue curtailment regulation that would affect pipeline owner's direct sales contracts with industrial customers based on interstate "transportation" jurisdiction, especially to protect interests of ultimate consumers). As a general rule, local gas

distribution companies oppose such bypass arrangements, which take away big customers and substantial revenues and rate base from those companies, which are required to serve all customers in a given area.

The parties to this action disagree as to whether the Natural Gas Act applies to bar state regulation of bypass arrangements where the operator of an interstate natural gas pipeline delivers gas directly to the customer but does not also sell the gas to the customer. FERC, which is not a party to this case, and plaintiff Midwestern Gas Transmission Company (Midwestern) both say the federal law bars state regulation of such arrangements. Defendant Southern Indiana Gas and Electric Company (SIGECO) says it does not. The defendant Commissioners of the Indiana Utility Regulatory Commission have indicated they agree with SIGECO, although their principal point is that they are entitled to decide the issue themselves and to have their decision reviewed through normal processes of judicial review. The line between federal and state regulatory jurisdiction over such bypass arrangements has considerable importance in the natural gas industry and to consumers, both large and small, of natural gas. As shown below, there is ample ground for reasonable disagreement on that issue.

The central issue in this case, however, is much narrower. Plaintiff Midwestern seeks an injunction to stop three administrative proceedings now pending before the Indiana Utility Regulatory Commission. The issue here is only whether federal law somehow bars the Indiana Commission from even considering the issue of its jurisdiction and from having its decisions subjected to ordinary judicial review through the Indiana courts and ultimately to the

Supreme Court of the United States. As explained below, the answer is no. Abstention under *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), applies here, so that an injunction to stop the ongoing state proceedings is not warranted. The jurisdictional contest over natural gas bypass arrangements may go forward in the state proceedings and through the ordinary channels of judicial review. The court therefore denies plaintiff's request for injunctive relief and grants defendants' motions to dismiss this action.

The Facts

Plaintiff Midwestern is a "natural-gas company" under the Natural Gas Act, 15 U.S.C. §717a. The defendants are the SIGECO and the named Commissioners of the Indiana Utility Regulatory Commission (the "Indiana Commission"). Midwestern has contracted to transport natural gas directly to two large industrial users who buy the gas outside the state of Indiana. Those two industrial users, Grain Processing Corporation (GPC) and Scepter, Inc., are the ultimate consumers of the gas thus transported. GPC and Scepter do not purchase gas from Midwestern itself, however. The facilities of both GPC and Scepter lie within the geographic area that the Indiana Commission has allotted to SIGECO for local distribution of natural gas.

I. *The Indiana Statutes*

Section 87 of the Indiana Public Service Commission Act of 1913, as amended, requires a certificate of necessity from the Indiana Commission before a "gas utility" may render "gas distribution service" in any rural area in the state of Indiana. Ind. Code §8-1-2-87(c). A "gas utility" is defined

as "any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the state of Indiana for his, its or their domestic, commercial, or industrial use." Ind. Code §8-1-2-87(a)(4). The term "gas distribution service" is defined in Section 87 to mean "the furnishing or sale of gas directly to any consumer within the state of Indiana for his or its domestic, commercial, or industrial use." Ind. Code §8-1-2-87(a)(5). A gas utility seeking to provide such service must file an application with the Commission. The applicant has the burden of proving at a hearing that it has lawful power and authority to obtain the certificate, that it has the financial ability to provide the gas distribution service, that public "conveyance [sic] and necessity" require the rendering of the proposed service, and that the public interest will be served by issuing the certificate. Ind. Code §8-1-2-87(d).

Indiana law also imposes more specific requirements that apply to so-called "bypass" arrangements like those at issue in this case. Specifically, Ind. Code §8-1-2-87.5 ("Section 87.5") was enacted in 1985 and provides in part:

> (b) Any person, corporation, or other entity that:
>
> (1) is engaged in the transportation of gas from outside Indiana for direct sale or delivery to any end use consumer or consumers within this state;
>
> (2) is engaged in the transportation of gas solely within this state on behalf of any end use consumer or consumers; or

> (3) is an end use consumer engaged in the transportation within this state of gas owned or acquired by such end use consumer for use in this state, other than transportation on the premises where the gas is consumed;
>
> is a public utility as defined in [Ind. Code §8-1-2-1] and must obtain a necessity certificate from the commission before it may engage in any activities described in this subsection. This subsection does not apply to a gas utility operating pursuant to an indeterminate permit or necessity certificate issued under [Ind. Code §8-1-2-87], nor to the production, sale, and gathering of natural gas produced in Indiana.

In addition, Ind. Code §8-1-2-87.6 governs the production, sale, gathering, and transportation of natural gas produced in Indiana. (The full text is set forth below in footnote 11 where the court addresses the dormant Commerce Clause issues raised with respect to Section 87.6.)

Midwestern owns and operates an interstate gas pipeline that operates in four states, including Indiana. Midwestern and SIGECO agree that Sections 87 and 87.5 by their terms apply to Midwestern's bypass arrangements with GPC and Scepter. Midwestern's pipeline is also connected to the SIGECO distribution system. SIGECO receives gas transported by Midwestern and then distributes that gas to SIGECO's customers, including residential, commercial, and industrial users.

II. *Midwestern's Bypass Arrangements with GPC and Scepter*

GPC operates a facility for processing corn in a rural area of Daviess County, Indiana, which is in SIGECO's service area as designated by the Indiana Commission. Midwestern contracted with GPC to construct and operate a new pipeline 2.8 miles long that connects the GPC facility to Midwestern's interstate pipeline. Midwestern also agreed to transport through these pipelines to GPC natural gas that GPC purchases from out-of-state suppliers other than Midwestern. Midwestern does not sell natural gas to GPC. At the present time, the Midwestern connection to GPC is in operation and gas is being delivered to GPC through that connection.

Scepter, Inc. operates an industrial facility where it recycles aluminum scrap and dross in Knox County, Indiana, which is also in SIGECO's service area as designated by the Indiana Commission. Scepter built a pipeline from its facility across land owned by other persons to connect with Midwestern's interstate pipeline. See Hardy Aff., Ex. A. Midwestern contracted with Scepter to transport natural gas to Scepter that Scepter purchases from out-of-state suppliers other than Midwestern. Midwestern also does not sell natural gas to Scepter. Scepter built, owns, operates, and maintains the pipeline connecting its facility to the Midwestern interstate pipeline. See Hardy Aff. P 3; Stokdyk Aff., Ex. C at 2. Before Scepter's direct connection to Midwestern was opened, Scepter received natural gas service from SIGECO. That connection from SIGECO has been closed, but it could be re-opened easily on short notice.

Midwestern contends that its connections with GPC and Scepter are under the sole regulatory jurisdiction of FERC, and that the federal Natural Gas Act preempts Indiana's Sections 87 and 87.5 as applied to such bypass connections. SIGECO disagrees. The jurisdictional dispute has generated several federal and state administrative proceedings.

III. *Proceedings on the GPC Connection*

On May 12, 1998, Midwestern filed a request with FERC pursuant to the Natural Gas Act seeking authorization to provide gas transportation services to GPC. SIGECO responded to public notice of the proceeding by filing a protest with FERC. SIGECO asserted that Midwestern's service to GPC would violate Sections 87 and 87.5 unless Midwestern first obtained a state necessity certificate from the Indiana Commission.

SIGECO also filed a petition directly with the Indiana Commission asking it to undertake an enforcement action under Ind. Code §8-1-2-115 and to issue a cease and desist order to Midwestern unless and until Midwestern complied with Sections 87 and 87.5. Other gas utilities -- Indiana Gas Company, NIPSCO, Citizens Gas, and Community Natural Gas -- also intervened in that proceeding, as did GPC. In the state proceeding, Midwestern filed a motion with the Indiana Commission on July 20, 1998, to dismiss the proceeding for lack of jurisdiction. Midwestern also filed an alternative petition asking the Commission to certify the issue of preemption for an interlocutory appeal to the Indiana Court of Appeals. See Ind. Code §8-1-3-10 (authorizing interlocutory appeals on questions of law certified by the Commission).

SIGECO asked FERC to defer its decision until after consideration of the issue by the Indiana Commission. FERC refused and claimed sole jurisdiction over the proposed bypass arrangement. On December 16, 1998, FERC issued authorization for Midwestern to proceed with the GPC contract. Midwestern then renewed its request for the Indiana Commission to dismiss the state proceedings. It also withdrew its petition for certification of the preemption issue to the Indiana Court of Appeals. On January 27, 1999, the Indiana Commission denied Midwestern's renewed request to dismiss the matter but stayed the proceedings to allow the preemption issue, then still before FERC on rehearing, to progress "through federal channels."[1]

On May 12, 1999, FERC denied SIGECO's request for a rehearing on the GPC matter. On August 21, 1999, FERC denied SIGECO's later request for reconsideration, as well. Under federal law, SIGECO and other parties to the FERC proceeding had the right to seek judicial review of FERC's decision in a United States Court of Appeals. *See* 15 U.S.C. §717r(b). SIGECO did not file a notice of appeal to seek such review of FERC's order on the Midwestern-GPC bypass arrangement. The time for appeal has passed and the FERC determination has accordingly become final and unappealable. The Indiana Commission was formally notified of that fact on July 18, 2000. There is no indication in this court's record that SIGECO or Midwestern has asked the

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[1] After the Indiana Commission denied Midwestern's motion to dismiss, SIGECO also filed suit in the Knox Circuit Court challenging Knox County's issuance of a permit to Midwestern to lay, maintain, and operate a pipeline within the county's right of way. That proceeding has also been stayed.

Indiana Commission to lift the stay of the state proceeding on the GPC bypass arrangement.

IV. *Proceedings on the Scepter Connection*

On October 13, 1999, Midwestern applied to FERC for authorization concerning the contract with Scepter. SIGECO declined to intervene in that proceeding in any way. The application was automatically approved by FERC 45 days after filing in accordance with the Natural Gas Act and its regulations. Thus, neither SIGECO nor the Indiana Commission participated in the FERC proceeding on the Scepter bypass arrangement.

After FERC issued its approval, SIGECO filed two petitions with the Indiana Commission, one against Midwestern and one directly against Scepter. In the Midwestern proceeding, SIGECO asked the Commission to investigate the Scepter connection and to order Midwestern to cease and desist from rendering gas distribution service in a rural area unless and until it obtained a necessity certificate from the Commission to do so. In the Scepter case, SIGECO asked the Commission to investigate the matter and to order Scepter to cease and desist from transporting gas in violation of Ind. Code §8-1-2-87.5(b)(3), which applies to a customer's transportation of gas across property other than the premises where the gas is consumed. On February 21, 2000, Midwestern filed a motion with the Indiana Commission for summary judgment in its case. Scepter did the same in its case. On April 10, 2000, Midwestern filed an initial complaint for declaratory relief and summary judgment in this court. Midwestern also sought a preliminary injunction. The

court heard argument on that motion while the parties were beginning to brief other dispositive motions. In early May, Midwestern and Scepter filed motions with the Commission to stay its proceedings pending the result from this court.

The Legal Issues

Midwestern seeks a declaration that FERC has exclusive jurisdiction over the bypass arrangements and an injunction prohibiting the Indiana Commissioners and SIGECO from taking further action regarding Midwestern, GPC, and Scepter, including the proceeding against Scepter to which Midwestern is not a party. SIGECO has moved to dismiss this action for lack of a ripe case or controversy. The Indiana Commissioners have moved to dismiss on the basis of Eleventh Amendment immunity for states and their officials acting in their official capacity. All defendants also contend that the court should abstain from issuing an injunction or deciding which agency has regulatory jurisdiction. Defendants rely primarily on the *Younger v. Harris* doctrine, which often applies when a federal court is asked to enjoin ongoing state proceedings. Finally, both sides have also filed motions for summary judgment as to whether the Indiana Commission may exercise jurisdiction over Midwestern's deliveries of gas to GPC and Scepter.

Because the ripeness issue affects subject matter jurisdiction under Article III of the Constitution, the court considers that issue first, then turns to the Eleventh Amendment defense and finally to the *Younger* abstention issue. Because the court finds that *Younger* abstention is required here, the court does not reach the parties' motions for summary judgment on the underlying jurisdictional dispute

as between FERC and the Indiana Commission.

I. *A Ripe Case or Controversy*

SIGECO contends first that the court must dismiss this action for lack of subject matter jurisdiction because there is no ripe case or controversy. SIGECO argues that the mere pendency of the proceedings before the Indiana Commission does not inflict any arguable injury on Midwestern, and that Midwestern is complaining only about possible effects that it might suffer if and when the Indiana Commission orders it to cease and desist from delivering gas to GPC and Scepter without a necessity certificate from the Commission. The court disagrees, essentially for reasons stated in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986), in which a state civil rights commission was investigating a complaint of sex discrimination by a teacher at a religious school. The school sought an injunction to stop the administrative proceeding, claiming that the proceeding itself violated the school's First Amendment rights to free exercise of religion. The Supreme Court addressed the ripeness issue in a footnote:

> We think that any ripeness challenge to appellees' complaint is foreclosed by *Steffel v. Thompson*, 415 U.S. 452, 39 L. Ed. 2d 505, 94 S. Ct. 1209 (1974), and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975). *Steffel* held that a reasonable threat of prosecution for conduct allegedly protected by the Constitution gives rise to a sufficiently ripe controversy. 415 U.S. at 458-460. If a reasonable threat of

> prosecution creates a ripe controversy, we fail to see how the actual filing of the administrative action threatening sanctions in this case does not. It is true that the administrative body may rule completely or partially in appellees' favor; but it was equally true that the plaintiffs in *Steffel* and *Doran* may have prevailed had they in fact been prosecuted.

477 U.S. at 625-26 n.1; *see also Younger v. Harris*, 401 U.S. at 41 (indictment and pending prosecution of federal plaintiff established "an acute, live controversy with the State and its prosecutor"). The same reasoning applies here. The state proceedings are not merely threatened. They are actually pending. The issues relevant to the underlying jurisdictional dispute are fully developed. The principal dispute is over which of several available routes toward a possible final resolution of that issue in the Supreme Court of the United States should be available. That dispute is better addressed in terms of *Younger* abstention. At least for purposes of declaratory relief, the case presents a ripe controversy involving sufficiently imminent threats of future harm to Midwestern resulting from the Indiana Commission proceedings.

II. *The Eleventh Amendment*

Plaintiff Midwestern originally named as a defendant the Indiana Utility Regulatory Commission itself. In response to the Commission's motion to dismiss based on the Eleventh Amendment, Midwestern filed an amended complaint adding as defendants the five individual Commissioners in their

official capacities. The Commissioners also contend the Eleventh Amendment bars relief against them.

The Eleventh Amendment provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court has held that the Eleventh Amendment bars not only those suits specifically covered by its wording but also suits brought against a state by the state's own citizens. The Amendment restricts a federal court from hearing damages actions against states or state officials acting in their official capacities. The Amendment also bars private individuals from bringing suit against states and state agencies in a federal court, with certain exceptions. *See generally Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-69, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997) (noting that the "Court's recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment").

No exception applies to Midwestern's suit directly against the Indiana Utility Regulatory Commission itself. The Commission is therefore entitled to dismissal on Eleventh Amendment grounds. The court has modified the caption in this action to remove the Indiana Commission as a named party.

To pursue its claim for relief, Midwestern relies primarily on the doctrine of *Ex parte Young* to obtain injunctive and declaratory relief against the five Commissioners in their official capacities. Under *Ex parte Young*, an individual state officer may be sued in his or her

official capacity to enjoin a prospective action under state law that would violate the Constitution. 209 U.S. 123, 159-160, 28 S. Ct. 441, 52 L. Ed. 714 (1908). As a matter of doctrine, *Ex parte Young* "treats state officials violating federal law 'as renegades acting ultra vires.'" *Dean Foods Co. v. Brancel*, 187 F.3d 609, 613 (7th Cir. 1999), quoting *David B. v. McDonald*, 156 F.3d 780, 783 (7th Cir. 1998). The doctrine is a species of legal fiction, but it is a venerable legal fiction that plays a central role in the relationship between federal law and state governments. "Where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar." *Coeur d' Alene Tribe*, 521 U.S. at 276-77 (opinion of Kennedy, J.); *accord*, *id.* at 294 (opinion of O'Connor, J.).

The Indiana Commissioners contend that *Coeur d'Alene Tribe* foreshadows the future abandonment or sharp restriction of the rule of *Ex parte Young* so as to bar the present suit. This court disagrees. Justice O'Connor's concurring opinion, joined by Justices Scalia and Thomas, provided the narrowest grounds for the Court's decision and is therefore controlling. Justice O'Connor reasoned that the doctrine of *Ex parte Young* should not be extended to the unusual case presented by the tribe's action, which sought not only title to the state's land (the bed of Lake Coeur d'Alene) but also a determination that would extinguish forever the sovereign power of the State of Idaho over that property. 521 U.S. at 289. In reaching that conclusion, however, Justice O'Connor plainly reaffirmed the vitality of *Ex parte Young* as that case has been applied for nearly a century. *See id.* at 291-96. Simply put, a suit under *Ex parte Young* is available where a plaintiff alleges an ongoing violation of federal law

and where the relief sought is prospective. *See id.* at 294 (O'Connor, J., concurring); *accord*, *Alden v. Maine*, 527 U.S. 706, 757, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999) (where the relief sought is prospective and there is an ongoing violation of federal law, a suit under *Ex parte Young* is proper).

This analysis is also supported by *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323 (7th Cir. 2000), in which the Seventh Circuit recently reaffirmed the vitality of *Ex parte Young* and rejected Eleventh Amendment arguments by state utility regulators similar to those raised here. The Seventh Circuit found that carriers' actions seeking prospective relief under federal law against state utility regulators in their official capacities presented a straightforward application of *Ex parte Young* that had not been undermined by *Coeur d'Alene Tribe*, 222 F.3d at 347-48; *see also Crenshaw v. Supreme Court of Indiana*, 170 F.3d 725, 729 (7th Cir. 1999) (Eleventh Amendment required dismissal of state court and attorney disciplinary commission as defendants in constitutional challenge to procedures, but not claims against state officials named in their official capacities).

In this case, Midwestern seeks only prospective equitable relief against the named Indiana Commissioners in their official capacities, and this suit does not fall within the narrow exception to *Ex parte Young* recognized in *Coeur d'Alene Tribe*. The Eleventh Amendment therefore does not bar the action against the Commissioners in their official capacities.

III. *Younger Abstention*

The defendant Commissioners and SIGECO contend that this court should abstain under *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), from issuing any injunction that would halt the ongoing proceedings before the Indiana Commission. As Midwestern points ou: "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983), quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976). However, the *Younger* exception is well-established and often applies when federal courts are asked to enjoin state proceedings that are judicial in nature. "When confronted with circumstances that clearly implicate *Younger* concerns, a federal court must abstain." *Crenshaw v. Supreme Court of Indiana*, 170 F.3d at 730, quoting *Barichello v. McDonald*, 98 F.3d 948, 955 (7th Cir. 1996).

In *Younger*, the Supreme Court held that a lower court had erred by enjoining a pending criminal prosecution in state court in the absence of bad faith, harassment, or other extraordinary circumstances that would make the defense in the state criminal proceeding insufficient to protect the federal plaintiff's federal rights. 401 U.S. at 46, 53. The Supreme Court has extended *Younger* to bar federal court injunctions against ongoing state administrative proceedings where those proceedings are judicial in nature, implicate important state interests, and provide an adequate opportunity to raise constitutional challenges. *See Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627, 91 L. Ed.

2d 512, 106 S. Ct. 2718 (1986); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982); *accord*, *Trust and Investment Advisers, Inc. v. Hogsett*, 43 F.3d 290, 295 (7th Cir. 1994) (following *Middlesex County*).

Midwestern argues that *Younger* abstention should not apply here for several reasons. Midwestern argues first that the Indiana Commission proceedings (a) do not involve important state interests, (b) are not judicial in nature, and (c) do not provide an adequate opportunity to present Midwestern's constitutional challenges. Midwestern also argues (d) that the court should apply an exception to *Younger* abstention because the Indiana Commission proceedings are "flagrantly and patently" unconstitutional and because they are attempts to "relitigate" rights and issues already determined by FERC. The court concludes that *Younger* abstention is appropriate here.

A. *Important State Interests*

The state proceedings here plainly implicate important state interests, both generally in the regulation of natural gas and specifically in the regulation of bypass arrangements with industrial customers. *See*, *e.g.*, *General Motors Corp. v. Tracy*, 519 U.S. 278, 304-06, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997) ("This Court has also recognized the importance of avoiding any jeopardy to service of the state-regulated captive market . . . ."), citing *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329, 95 L. Ed. 993, 71 S. Ct. 777 (1951), and *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507, 92 L. Ed. 128, 68 S. Ct. 190 (1947). In both

Panhandle-Michigan and *Panhandle-Indiana*, the Court held that states could exercise regulatory authority over bypass arrangements for large industrial gas customers, at least where the same entity both sold the gas and transported it directly to the customer. In *General Motors v. Tracy*, the Court was also addressing bypass arrangements, although in the context of a state tax that applied to bypass sales but not to other retail sales.

Midwestern argues that Indiana has no legitimate interest in "regulating interstate natural gas transportation." That argument is ultimately circular because it is based on the assumption that Midwestern's preferred view on the underlying jurisdictional argument will prevail. Indiana plainly has a sufficient interest in this subject matter to support application of *Younger* abstention if the other criteria are satisfied.

B. *Proceedings Judicial in Nature*

The three proceedings before the Indiana Commission were initiated by SIGECO filing petitions asking the Commission to order Midwestern and Scepter to cease and desist from alleged violations of Indiana law. See Ind. Code §8-1-2-115 (Commission's enforcement authority). The potential results of these proceedings would include orders from the Indiana Commission that would be enforceable in the state courts. Also, violations of Indiana public utility laws can lead to civil liability and to penalties for infractions. See Ind. Code §§ 8-1-2-107 and 8-1-2-109. The Seventh Circuit has recognized that, for purposes of *Younger* abstention, administrative proceedings are "judicial in nature" when they are coercive, such as with "state enforcement proceedings,"

as distinct from remedial or legislative proceedings. *Majors v. Engelbrecht,* 149 F.3d 709, 712 (7th Cir. 1998) (state professional licensing proceeding was judicial in nature).

Midwestern argues that the Indiana Commission proceedings should be deemed legislative proceedings beyond the reach of *Younger* because they are essentially no different from proceedings on whether to issue a certificate of necessity, which would be deemed legislative in nature for purposes of state law. *See General Telephone Co. of Indiana v. Public Service Comm'n*, 238 Ind. 646, 150 N.E.2d 891, 894 (Ind. 1958) ("The allocation of a utility service area is a legislative function."). In *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989), the Supreme Court addressed what it means for an administrative proceeding to be judicial in nature for *Younger* purposes. The specific question in *New Orleans* was whether a city council's proceeding that resulted in a determination regarding a public utility's request for a rate increase should be treated as judicial in nature. The Court held that the city council proceeding was legislative in nature and that *Younger* abstention was not appropriate: "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. . . . The making of a rule for the future . . . is an act legislative and not judicial in kind." *New Orleans*, 491 U.S. at 370-71, quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 53 L. Ed. 150, 29 S. Ct. 67 (1908). The Court recognized that it had long treated utility rate-making as "an essentially legislative act." 491 U.S. at 371.

Midwestern asserts that the Indiana certification process under Sections 87 and 87.5 is legislative in nature, similar to the rate-making function of the city council in *New Orleans*. However, the test in *New Orleans* looks to the outcome of the proceeding -- the result contemplated by the process defines its nature. The outcome of the process in *New Orleans* was a change in the public utility's rates. The ultimate results of the Indiana Commission proceedings here will not be a "rule for the future." The Commission has already carried out the "legislative" function of allocating a utility service area. Rather, the Commission has been asked to decide whether specific facts violate Indiana law and, if so, to decide upon appropriate penalties and enforcement mechanisms. Those circumstances distinguish this case from *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1053 (7th Cir. 1990), in which the Seventh Circuit held that a state administrative proceeding on whether to approve the sale of an insurance holding company was legislative in nature and thus could not support *Younger* abstention.[2]

The Commission will make those decisions about penalties and enforcement mechanisms through a process in which the parties charged with violating law have the rights to be heard, to present evidence, to cross-examine adverse witnesses, and so on. In Justice Holmes' words from *Prentis v. Atlantic Coast Line*, the Commission has been asked to

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[2] The Seventh Circuit's decision in *Alleghany Corp.* was ultimately vacated as moot, see *Dillon v. Alleghany Corp.*, 499 U.S. 933, 113 L. Ed. 2d 441, 111 S. Ct. 1383 (1991), but the Seventh Circuit has continued to treat the opinion as authoritative. See, *e.g.*, *Majors v. Engelbrecht*, 149 F.3d at 712; *Hinrichs v. Whitburn*, 975 F.2d 1329, 1333 (7th Cir. 1992).

investigate, declare, and enforce liabilities as they stand on present or past facts and under laws supposed already to exist. The Indiana Commission proceedings are judicial in nature for purposes of *Younger* abstention.

C. *Adequate Forum for Constitutional Issues*

Younger abstention in deference to ongoing state proceedings is not appropriate if the state proceedings do not provide an adequate forum for hearing the federal constitutional issues being raised in the federal lawsuit. *See Younger, 401* U.S. at 49 (state prosecution would give Harris "an opportunity to raise his constitutional claims"). As a general rule, of course, federal courts recognize that state courts are fully capable of and responsible for interpreting and following the United States Constitution. "It has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Id.* at 45. "Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Middlesex County*, 457 U.S. at 431 (emphasis in original).

A complication here is the possibility that the Indiana Commission will conclude that it is not authorized under state law to pass on the constitutionality of state statutes. *See General Motors Corp. v. Indianapolis Power & Light Co.*, 654 N.E.2d 752, 763 n.2 (Ind. App. 1995) (Commission did not have jurisdiction to adjudicate challenge to constitutionality of statute underlying its order); *cf. Alleghany Corp. v. Haase*, 896 F.2d at 1054 (Easterbrook, J., concurring) ("No one believes these days that legislative and

executive branches of state governments may ignore the Constitution and federal law until slapped with an injunction."). Even if state law bars the Commission itself from deciding the constitutionality of a state statute, however, that would not be controlling here, as shown by the Supreme Court's decision in *Dayton Christian Schools, supra.* In that case, private schools claimed they were being subjected to state administrative proceedings in violation of their First Amendment rights. The schools argued that state law prohibited the state administrative body from considering constitutional defenses to otherwise applicable law. 477 U.S. at 629.

The Supreme Court was skeptical of the argument, noting that it "would seem an unusual doctrine . . . to say that the Commission could not construe its own statutory mandate in the light of federal constitutional principles." *Id.* Nevertheless, the asserted limit would not have affected the outcome of the case even it were actually in effect: "In any event, it is sufficient under *Middlesex* [*County*, 457 U.S. at 436], that constitutional claims may be raised in state-court judicial review of the administrative proceeding." *Id.* In the *Middlesex County* case, in turn, the Court had deemed it sufficient for purposes of *Younger* abstention that constitutional challenges to state bar disciplinary matters could be presented to the state supreme court, either by interlocutory appeal or on appeal from a final decision. 457 U.S. at 436 & n.15.

Similarly here, even if the Commission were to decide it does not have the power to consider the constitutionality of applying the Indiana statutes to Midwestern and Scepter, the Commission clearly has the ability to certify such questions of

law to the Indiana Court of Appeals for decision. Ind. Code §8-1-3-10. Even if the Commission chose not to take the step, the constitutional issues Midwestern wishes to present here could be heard on judicial review of any enforcement action taken. The Indiana courts are fully capable of deciding those issues. *See, e.g., General Motors Corp. v. Indianapolis Power & Light Co.*, 654 N.E.2d at 763 (addressing Commerce Clause challenges to state statutes that Commission could not decide).

In addition, the judicial review process will provide Midwestern an opportunity for a federal forum for its constitutional claims. Like any litigant in a state court, if Midwestern is ultimately disappointed with the result in the state courts, it may file a certiorari petition with the Supreme Court of the United States. Because state enforcement proceedings are pending, however, the mere assertion of a constitutional claim simply is not sufficient to require a federal court to halt those state proceedings. *See New Orleans*, 491 U.S. at 365 ("It is clear that the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction."); *Alleghany Corp.*, 896 F.2d at 1051-53 (explaining that while administrative officials may be limited in their ability to interpret the Constitution, the defendant in an ongoing state enforcement proceeding is not at liberty to enjoin the state by turning to the federal courts on those grounds).

D. *Exceptions to Younger Abstention*

Thus, the basic elements of *Younger* abstention are present in this case: ongoing proceedings are judicial in nature, involve important state interests, and provide a

suitable forum for hearing Midwestern's federal constitutional challenges to Indiana law. However, the doctrine of abstention remains equitable in nature. *Younger* abstention may not be appropriate in certain exceptional circumstances, such as where the state proceedings are being pursued in bad faith or based on a desire to harass the opponent, or where the challenged state statute is "flagrantly and patently" unconstitutional. *See Middlesex County*, 457 U.S. at 429; *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975); *Younger v. Harris*, 401 U.S. at 53-54.

Midwestern argues that SIGECO is acting in bad faith and for the purpose of harassing it. The argument is founded upon Midwestern's view of the merits and its belief that SIGECO should simply acquiesce after FERC and several federal circuits have rejected the arguments it raises.

The court finds no evidence of harassment or bad faith on the part of SIGECO, let alone the Indiana Commissioners. To contest the jurisdictional issue, SIGECO filed before the Indiana Commission and chose the forum it believes best protects its interests, just as Midwestern chose FERC as the forum that best protected its interests. If the Indiana statutes are valid, facts in this record provide ample reason to believe Midwestern and Scepter are in violation of Indiana law, to the detriment of SIGECO. SIGECO was entitled to turn to the Commission to seek enforcement of the state laws. Both SIGECO and the Commissioners are certainly aware of the debate over the scope of state and FERC jurisdiction. Neither SIGECO nor the Commissioners are required to defer to FERC proceedings and judicial review of FERC decisions as the sole procedure for resolving those issues.

Furthermore, a "plaintiff asserting bad faith prosecution as an exception to *Younger* abstention must allege specific facts to support an inference of bad faith. . . . This specific evidence must show that state prosecution was brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights." *Collins v. County of Kendall, Illinois*, 807 F.2d 95, 98 (7th Cir. 1986) (internal quotation omitted).[3] No specific evidence of this nature has been presented by Midwestern. Certainly Midwestern has offered no support for its extraordinary assertion, see Hearing Tr. at 27-28, that the sole avenue open to the Indiana Commission itself to resolve these jurisdictional disputes is to intervene in FERC's own administrative proceedings and then to appeal from adverse rulings.

As to extraordinary circumstances, "whatever else is required, such circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." *Moore v. Sims*, 442 U.S. 415, 433, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979), quoting *Kugler v. Helfant*, 421 U.S. 117, 125, 44 L. Ed. 2d

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[3] In *Collins*, the court held that 34 state criminal prosecutions in two years did not establish bad faith where some resulted in convictions, some in acquittals, some in dismissals, and others were still pending. 807 F.2d at 98-99. Midwestern would have to produce far more than the conclusory assertion that SIGECO launched the state proceedings in bad faith. *See also Juidice v. Vail*, 430 U.S. 327, 338, 51 L. Ed. 2d 376, 97 S. Ct. 1211 (1977) ("This exception may not be [used] unless it is alleged and proved that they are enforcing the . . . [state] procedures in bad faith or are motivated by a desire to harass.").

15, 95 S. Ct. 1524 (1975). Midwestern has not shown such an extraordinarily pressing need for immediate federal equitable relief.

Midwestern's principal argument against *Younger* abstention is that the Indiana statutes governing bypass arrangements are "flagrantly and patently" unconstitutional because they are preempted by the Natural Gas Act and violate the dormant Commerce Clause. The Supreme Court has repeatedly said that patent unconstitutionality is an exception for *Younger* abstention, but actual applications of the exception are few and far between. *See New Orleans Public Service*, 491 U.S. at 367 (assuming without deciding that a "facially conclusive claim" of federal preemption would render abstention inappropriate); *Younger*, 401 U.S. at 53-54 (federal plaintiff might show irreparable injury by showing that challenged statute is "flagrantly and patently violative of express constitutional prohibitions"), quoting *Watson v. Buck*, 313 U.S. 387, 402, 85 L. Ed. 1416, 61 S. Ct. 962 (1941); *Public Utilities Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 469, 87 L. Ed. 396, 63 S. Ct. 369 (1943) (before *Younger*, affirming injunction to stop state commission from attempting directly to regulate interstate gas prices). The court considers first the issue of preemption under the Natural Gas Act, then the dormant Commerce Clause issue. The court then turns to Midwestern's argument that *Younger* abstention should not apply because the Commission proceedings are an effort to "relitigate" matters that FERC has already decided.

1. *Preemption under the Natural Gas Act*

On the central jurisdictional issue, Midwestern contends its bypass arrangements with GPC and Scepter

involve only "the transportation of natural gas in interstate commerce," which is a matter for FERC under the Natural Gas Act, 15 U.S.C. §717(b). SIGECO contends that the bypass arrangements amount to "the local distribution of natural gas," the regulation of which is left to the states. *Id.*

The Supreme Court's decisions in the two *Panhandle* cases provide a good starting point for understanding the jurisdictional dispute. Both dealt with an interstate pipeline's efforts to bypass local distribution companies to serve industrial customers directly. *See Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n,* 341 U.S. 329, 95 L. Ed. 993, 71 S. Ct. 777 (1951) ("*Panhandle-Michigan*"); *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507, 92 L. Ed. 128, 68 S. Ct. 190 (1947) ("*Panhandle-Indiana*").

In *Panhandle-Indiana* the Court held without dissent that the Natural Gas Act did not bar the Indiana Commission from exercising jurisdiction over a bypass arrangement in which an interstate pipeline was selling and delivering gas directly to a large industrial customer. The Court acknowledged that the sales were "interstate transactions" that *could* be regulated by Congress. 332 U.S. at 512-13. Summarizing the history of its own Commerce Clause decisions on the gas industry, however, the Court explained that the Natural Gas Act was enacted not to exercise the full scope of the federal commerce power, but only to exercise federal jurisdiction over those aspects of the industry that the Court itself had held were not subject to state regulation. *Id.* at 514-17; see also *id.* at 519 ("Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach."). The Court

found that the Natural Gas Act drew the jurisdictional line "sharply and cleanly between sales for resale and direct sales for consumptive uses." *Id.* at 517. The Court concluded:

> It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption.

Id. at 519. The Court pointed out that the primary aims of the Natural Gas Act were to protect consumers against exploitation at the hands of natural gas companies and to establish cooperative action between federal and state agencies. "It could accomplish neither that protective aim nor the comprehensive and effective dual regulation Congress had in mind, if those companies could divert at will all or the cream of their business to unregulated industrial uses." *Id.* at 521.

Four years later the Supreme Court revisited the subject of bypass arrangements in *Panhandle-Michigan*. There the Court upheld a state commission's order requiring a certificate of necessity before an interstate pipeline could sell gas directly to a large industrial customer that was already served by a local distribution company. Following *Panhandle-Indiana*, the Court held that such sales were sales in interstate commerce but were subject to state regulatory jurisdiction because Congress had not exercised the full scope of its

commerce power, but had sought to occupy only that portion of the field that the Court itself had barred states from regulating. 341 U.S. at 333-35. The Court again recognized the substantial interest that states have in such bypass arrangements:

> The facts in the instant case show that the proposed sales are primarily of local interest. They emphasize the need for local regulation and the wisdom of the principles just discussed. To accommodate its operations, appellant proposes to use the streets and alleys of Detroit and environs. A local utility already operating in the same area, Consolidated, receives its entire supply of natural gas from appellant. A substantial portion of Consolidated's revenues is derived from sales to large industrial consumers. Appellant ignored requests of Consolidated for additional gas to meet the increased wants of its industrial customers. Instead of attempting to meet increased needs through Consolidated, appellant launched a program to secure for itself large industrial accounts from customers, some of whom were already being served by Consolidated. In connection with the Ford Motor Company, it is noteworthy that the tap line by which appellant proposed to serve Ford directly would be substantially parallel to and only a short distance from the existing tap line by which Consolidated now serves Ford.
>
> Thus, not only would there be two

> utilities using local facilities to accommodate their distribution systems, but they would be seeking to serve the same industrial consumers. Appellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's over-all costs of service and its rates to customers whose only source of supply is Consolidated. This clearly presents a situation of "essentially local" concern and of vital interest to the State of Michigan.

Id. at 333-34.

Panhandle-Indiana and *Panhandle-Michigan* both involved bypass arrangements in which the same entity both sold and transported the gas in question directly to industrial customers. In both cases the Supreme Court held that the transactions fell outside the Natural Gas Act's grant of federal jurisdiction over "the sale in interstate commerce of natural gas for resale . . . ." 15 U.S.C. §717(b). The state interests identified by the Court do not appear to depend at all, however, on whether the seller and transporter of the gas are the same entity, two related entities, or two unrelated entities.

Nevertheless, Midwestern argues, and FERC has concluded, that the holdings and reasoning of the *Panhandle* cases do not extend to an interstate pipeline's transportation of natural gas directly to an industrial customer so long as the pipeline company itself did not also sell the gas. Midwestern

and FERC contend that the pipeline company is then engaged only in the "transportation of natural gas in interstate commerce," and not the "local distribution of natural gas" for purposes of 15 U.S.C. §717(b). FERC's position is set forth in its order approving Midwestern's bypass arrangement with GPC. *In re Midwestern Gas Transmission Co.*, 85 F.E.R.C. 61,358, 1998 FERC LEXIS 2574, *12-*16 (1998) (Ex. A to amended complaint). Midwestern supports this argument primarily with the line-up of the Sixth, Tenth, and District of Columbia Circuits, which have agreed with FERC that states may not regulate bypass arrangements, at least where the customer buys the gas from some entity other than the pipeline operator. These circuits addressed bypass arrangements in circumstances that cannot be distinguished from Midwestern's arrangements with GPC and Scepter.[4]

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[4] Midwestern actually argues that five circuits agree with it, also citing decisions of the Second and Fourth Circuits. In *National Fuel Gas Supply Corp. v. Public Service Comm'n of New York*, 894 F.2d 571, 579 (2d Cir. 1990), the Second Circuit held that New York's law requiring state environmental approval for a bypass pipeline project was preempted by the federal Natural Gas Act. In *Public Service Comm'n of West Virginia v. Federal Power Comm'n*, 437 F.2d 1234, 1237-38 (4th Cir. 1971), the Fourth Circuit held that a state could not exercise jurisdiction over a transaction involving the lease of a pipeline used for both interstate and intrastate activities where the lease involved only interstate rights. As compared to the opinions discussed in the text, however, these opinions did not address the arguments and authorities at the core of the dispute in this case and so provide little additional weight to Midwestern's arguments.

In *Public Utilities Comm'n of California v. FERC*, 283 U.S. App. D.C. 285, 900 F.2d 269, 273-77 (D.C. Cir. 1990), the District of Columbia Circuit rejected California's attempt to assert concurrent jurisdiction with FERC over the in-state gas taps and tie-in facilities that linked an interstate gas pipeline to an industrial end-user. *Accord*, *Public Utilities Comm'n of California v. FERC*, 330 U.S. App. D.C. 96, 143 F.3d 610, 617 (D.C. Cir. 1998) (reaffirming holding that there is no concurrent jurisdiction under Natural Gas Act); *Michigan Consolidated Gas Co. v. FERC*, 280 U.S. App. D.C. 45, 883 F.2d 117, 121-22 (D.C. Cir. 1989) (upholding FERC's exercise of jurisdiction to approve bypass arrangement despite apparent reversal of long-standing agency position on bypass issues). In *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1419-21 (10th Cir. 1992), the Tenth Circuit rejected another state's effort to assert concurrent jurisdiction over an industrial customer's construction of a tap and meter facility connecting to an interstate pipeline. In *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipeline Co.*, 887 F.2d 1295, 1298-1301 (6th Cir. 1989), the Sixth Circuit affirmed a district court injunction against the state regulatory commission's effort to assert jurisdiction over bypass arrangements.[5]

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[5] *Michigan Consolidated Gas* arose in a procedural context similar to this case -- a request to enjoin state enforcement proceedings after FERC had approved the bypass in question. (In fact, FERC's decision had been upheld by the District of Columbia Circuit in *Michigan Consolidated Gas v. FERC, supra*, 883 F.2d 117.) However, the Sixth Circuit was careful to note that no party had raised any issue of abstention, so the court did not address the issue. 887 F.2d at 1302 n.3.

These circuit court opinions have given careful and thoughtful attention, based on a long history of statutes and Supreme Court decisions, to just where the line between federal and state jurisdiction should be drawn with respect to bypass arrangements. In *Public Utilities Commission of California*, the District of Columbia Circuit relied primarily on *Federal Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464, 94 L. Ed. 268, 70 S. Ct. 266 (1950), to draw the line based on the size of pipes and the pressure levels in them. *See* 900 F.2d at 275-77 (FERC could exercise jurisdiction over "high-pressure trunk lines to the point where pressure was reduced and the gas entered local mains"), quoting *East Ohio Gas,* 338 U.S. at 470. The District of Columbia Circuit acknowledged that the *Panhandle* cases authorized state jurisdiction over bypass arrangements where the interstate pipeline operator was itself the seller of gas, but the court held that the industry practice of using separate companies to sell and transport the gas "removes this fulcrum for state power." 900 F.2d at 277. The court explained:

> We do not believe that this industry transition calls for a modification of *East Ohio*, or for finding it, *despite the Court's language*, limited to high pressure transmission *without delivery to an end user*. Despite the transition, the state of California has authority over the gas once it moves beyond the high-pressure mains into the hands of an end user. It may well also have authority at the moment of delivery to low-pressure facilities for transmission to end users, a point not before us but seemingly implied by *East Ohio*.

Id. (emphasis added). Thus, the District of Columbia Circuit extended *East Ohio Gas* beyond its language to hold, in essence, that as long as the gas is delivered to the industrial end-user in a large, high-pressure pipeline, FERC has jurisdiction and the state does not. But *see Panhandle-Indiana,* 332 U.S. at 513 ("Neither practical common sense nor constitutional sense would tolerate holding that reduction in pressure makes the industrial sales to Anchor-Hocking wholly intrastate for purposes of local regulation while deliveries at similar pressures to utility companies remain exclusively interstate. Variations in main pressure are not the criterion of the states' regulatory powers under the commerce clause.").

The Tenth Circuit reached the same result in *Cascade Natural Gas*, but by different reasoning. The Tenth Circuit chose not to follow the District of Columbia Circuit's reliance on the mechanical, pressure-based test of *East Ohio. See* 955 F.2d at 1420-21 & n.9. The Tenth Circuit instead applied a distinction between wholesale and retail sales, doing so in a way that limited state jurisdiction to local retail sales, excluding delivery to industrial customers where the customers have purchased gas in other states from entities other than the pipeline operator. *Id.* at 1421 ("While delivery by Northwest and delivery by Cascade are similar in that both result in the final local delivery for consumptive use, a local retail sale is conspicuously missing."). The Tenth Circuit focused on the Natural Gas Act's grant of jurisdiction to FERC over "the transportation of natural gas in interstate commerce," and relied on the Supreme Court's statement: "Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." *Id.* at 1417, quoting *Maryland v. Louisiana*, 451

U.S. 725, 755, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981). The Tenth Circuit also suggested that if the change in industry practices had undermined the assumptions on which the Natural Gas Act had been based, it was up to Congress to reign in FERC's jurisdiction. 955 F.2d at 1421.

In *Michigan Consolidated Gas*, the Sixth Circuit relied primarily on the quoted language from *Maryland v. Louisiana* and held that a bypass arrangement involving a seller distinct from the pipeline operator involved "interstate transportation" within the meaning of the Natural Gas Act, 15 U.S.C. §717(b). *See* 887 F.2d at 1299-1300. The court went on to conclude that, because FERC had jurisdiction over the arrangement, the state could not exercise jurisdiction over it.[6]

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[6] Midwestern Gas also suggests that the Seventh Circuit adopted similar reasoning with respect to electricity in *Wisconsin-Michigan Power Co. v. Federal Power Comm'n*, 197 F.2d 472 (7th Cir. 1952). The Seventh Circuit held in that case that transfers of electricity across state lines between a power company's generators, for purposes of sales to local utilities that would in turn resell the power to the public, were transfers in interstate commerce subject to federal regulation. The court's opinion offers some limited support for both sides in this case, but it does not address the issue of bypass arrangements with respect to gas or electricity. The Seventh Circuit followed the obvious and strong parallels between the federal *Natural Gas Act and the Federal Power Act*, 197 F.2d at 476, and it recognized that the federal legislation was intended "to place in the Federal Commission jurisdiction which never belonged to the states, that is, sales from interstate commerce to wholesalers for resale." *Id.* at 477. The court never had occasion to address whether the federal government or state government would have jurisdiction over arrangements through which an end-user purchased electricity (or gas) in another state and made

This line-up of federal circuit courts and the federal regulatory body deserves respect and careful consideration. The Seventh Circuit has often said that district courts in this circuit should "give most respectful consideration to the decisions of the other courts of appeals and follow them whenever [they] can." *E.g., Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987). Similarly, a federal agency's interpretation of an ambiguous statute it is charged with enforcing generally deserves considerable deference from the courts. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

There are limits to such deference, however. District courts should not follow other circuits uncritically, as the Seventh Circuit recently instructed in *Citizens for a Better Environment v. Steel Co.*, 230 F.3d 923, 926-27, 2000 WL 1528956, *3 (7th Cir. Oct. 17, 2000). There the appellate court disagreed with a district court that had relied on decisions of other circuits that did not explain persuasively their conclusions on the key issue. The parties before each federal court are entitled to that court's best judgment about a contested issue of law. *See Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 443 (7th Cir. 1994) (*en banc*) ("Our duty is to independently decide our own cases, which sometimes results in disagreements with decisions of the other circuits."), *aff'd sub nom. Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co.*, 516 U.S. 152, 133 L. Ed. 2d 535, 116 S. Ct. 595 (1996). Although that

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arrangements with an entity other than the seller to deliver the electricity (or gas).

judgment should be informed by decisions from other courts that do not directly control the court making the decision, a court cannot avoid responsibility for making its own decision by merely pointing out that other courts have decided the issue in a certain way.

Similarly, the Seventh Circuit has written that deference to an agency under *Chevron* is not appropriate with respect to an agency's (expansive) interpretation of its own jurisdiction. *United Transportation Union-Illinois Legislative Bd. v. Surface Transportation Bd.*, 169 F.3d 474, 477 (7th Cir. 1999) (dicta); *Midland Coal Co. v. Director, Office of Workers' Comp. Programs*, 149 F.3d 558, 561 (7th Cir. 1998) (*Chevron* deference "does not extend" to questions of an agency's jurisdiction).[7]

Even more to the point, the principle of deference under *Chevron* is, at bottom, a rule of statutory construction. *See Chevron,* 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). With respect to the federal Natural Gas Act, the Supreme Court has repeatedly traced and followed the congressional indications that the act was not intended to exercise the full scope of federal power over interstate commerce. It was intended

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[7] Compare *Mississippi Power & Light Co. v. Mississippi,* 487 U.S. 354, 380-81, 101 L. Ed. 2d 322, 108 S. Ct. 2428 (1988) (Scalia, J., concurring in the judgment) (*Chevron* deference applies to an agency interpretation of limits on its statutory jurisdiction), with *id.* at 386-87 (Brennan, J., dissenting) (*Chevron* deference does not apply to agency's jurisdictional determinations).

instead only to fill the regulatory gap left by the Supreme Court's own decisions barring states from regulating in certain situations involving interstate commerce. *See, e.g., Panhandle-Indiana*, 332 U.S. at 514-17. Under the Supreme Court's reading of the Natural Gas Act's jurisdictional grant in 15 U.S.C. §717(b), one could reasonably argue that the *Chevron* principle of deference does not even come into play, and that FERC's expansive view of its own jurisdiction over bypass arrangements is simply wrong. There is considerable support for that argument, as defendants have explained in their briefs.

The defendants build their arguments primarily on the Supreme Court's *Panhandle-Michigan* and *Panhandle-Indiana* decisions holding that states could exercise jurisdiction over bypass arrangements, at least so long as the same entity both sold the gas and transported it to the industrial end user. The defendants contend there is no persuasive reason to treat such bypass arrangements any differently based solely on the fact that the seller and the transporter of the gas are two distinct legal entities.

Under Midwestern's and FERC's analysis of this issue, federal jurisdiction would be exclusive even if the seller and transporter were two wholly-owned subsidiaries of the same parent company. Certainly the states' interests in regulating bypass arrangements, as set forth in the *Panhandle* decisions, are not affected at all by a legal separation between the seller and the transporter.

The defendants therefore contend that the appropriate line for state regulation is to permit state regulation of delivery (as well as sale) to any end-user, such as GPC and

Scepter in this case, as well as over in-state facilities linking the interstate pipeline to the end-user. Defendants contend these activities are "the local distribution of natural gas" under 15 U.S.C. §717(b). In addition, following the analysis in *Panhandle-Indiana* and *Panhandle-Michigan*, where the question under 15 U.S.C. §717(b) is whether a state could regulate the particular matter in question even if FERC did not exist, there is surely no doubt that a state could exercise legal and regulatory authority over the in-state facilities that link the end-user to the larger interstate pipeline. The state would certainly have substantial interests with respect to safety, for example, and the prospect of companies building and maintaining parallel, competing gas pipelines raises a number of local concerns of the sort that led to consolidation and regulation of local distribution monopolies a century or so ago. See generally *General Motors Corp. v. Tracy*, 519 U.S. 278, 288-90, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997) (summarizing history of gas and electric competition and eventual regulation).[8]

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[8] The *Tracy* Court noted, for example, that where municipalities allowed multiple gas franchisees to serve the same areas, the "predictable and disastrous" results were wasteful as competitors built parallel delivery systems and continually tore up streets to do so. 519 U.S. at 289-90 & n.5. In this case, the Scepter pipeline across another person's property to connect with the Midwestern pipeline reflects a first step in that direction, since Scepter was already connected to SIGECO's distribution system.

The fact that the Scepter pipeline crosses another person's property also raises the prospect of a related constitutional issue, which is whether property for such bypass pipelines could be taken by the power of eminent domain as a taking for a "public use." The

Supreme Court has repeatedly stated that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984), quoting *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80, 81 L. Ed. 510, 57 S. Ct. 364 (1937) (state's order requiring gas well owners with pipeline connections to purchase gas from other well owners without pipeline connections amounted to unconstitutional taking for private purpose); *accord, e.g., Cincinnati v. Vester*, 281 U.S. 439, 447, 74 L. Ed. 950, 50 S. Ct. 360 (1930) (city could not condemn private property without basis for finding the taking would serve public purpose; city's possible future sale of such property to others could not justify taking); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159-63, 41 L. Ed. 369, 17 S. Ct. 56 (1896) (taking of land and formation of water districts for purposes of irrigation project were for public purpose where all persons similarly situated had right to use the water); *Missouri Pacific Ry. Co. v. Nebraska*, 164 U.S. 403, 416-17, 41 L. Ed. 489, 17 S. Ct. 130 (1896) (taking of railroad's land for operation of private grain elevator was unconstitutional taking of private property for private purpose where elevator was not available for use by public).

The power of a public utility to take private property has always been founded on the premise that the taking is reasonably necessary to provide a service to the general public. That premise requires that the facilities be available to all similarly situated members of the public. *See, e.g., Gradison v. Ohio Oil Co.*, 239 Ind. 218, 156 N.E.2d 80, 85-86 (Ind. 1959) (oil pipeline could exercise power of eminent domain because it is "compelled to and does accept oil from any shippers"); *Department of Treasury v. City of Linton*, 223 Ind. 363, 60 N.E.2d 948, 951 (Ind. 1945) (privately owned utilities may exercise power of eminent domain "because the use they will make of the property is a public use"); *Westport Stone*

Defendants' position also finds significant support in the Supreme Court's 1997 opinion in *General Motors Corp. v. Tracy*. The specific issue before the Court was whether Ohio had violated the dormant Commerce Clause by imposing different taxes on purchases of gas from local distribution companies and purchases from any other seller, such as producers and independent marketers who tended to be

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Co. v. Thomas, 175 Ind. 319, 94 N.E. 406, 408 (Ind. 1911) (upholding right to condemn property to build branch rail line where public would have legal right to use it without discrimination); *see also Wisconsin Central Ltd. v. Public Service Comm'n*, 95 F.3d 1359, 1367-68 (7th Cir. 1996) (regarding public utilities' powers to take property rights from railroads); *Great Northern Ry. Co. v. Chicago, St. P., M. & O. Ry. Co.*, 78 S.D. 168, 99 N.W.2d 439, 443 (S.D. 1959) (one railroad could use eminent domain to cross another railroad's property to construct spur line because the spur line was "denied to no industry which it is reasonably feasible for the spur to serve"). If a railroad, road, or pipeline is built for purely private use and is not generally available to the public, any taking necessary to complete the project would not be a taking for a "public use." *See, e.g., Continental Enterprises, Inc. v. Cain*, 180 Ind. App. 106, 387 N.E.2d 86, 90-91 (Ind. App. 1979).

There is no indication here that eminent domain (or the prospect of its use) was used to obtain the right to build the pipeline across the neighboring property. However, it is difficult to see how property could be taken by eminent domain to construct a pipeline like Scepter's connection to Midwestern if only Scepter may use it. If, on the other hand, the pipeline were available for others to use, it is difficult to see how Midwestern would not then be engaged in the "local distribution" of gas under *any* definition of the term.

located in other states. The effect of the challenged tax was to tax bypass sales to large industrial customers, such as General Motors. The Supreme Court upheld Ohio's tax in an opinion that reviewed the evolution of natural gas markets and regulatory efforts. The Court wrote:

> Half a century ago we concluded that the NGA altogether exempts state regulation of retail sales of natural gas (including in-state sales to large industrial customers) from the strictures of the dormant Commerce Clause, *see Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 92 L. Ed. 128, 68 S. Ct. 190 (1947), and to this day, notwithstanding the national regulatory revolution, Congress has done nothing to limit its unbroken recognition of the state regulatory authority that has created and preserved the local monopolies. *The clear implication is that Congress finds the benefits of the bundled product for captive local buyers well within the realm of what the States may reasonably promote and preserve.*

519 U.S. at 304-05 (footnote omitted; emphasis added). The Court further explained:

> This Court has also recognized the importance of avoiding any jeopardy to service of the state-regulated captive market, and in circumstances remarkably similar to those of the present case. In *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341

U.S. 329, 95 L. Ed. 993, 71 S. Ct. 777 (1951), Ford Motor Company had entered a contract with an interstate pipeline for supply of gas at Ford's plant in Dearborn, Michigan, thus bypassing the local distribution company [LDC]. The Michigan Public Service Commission ordered the pipeline to cease and desist from making direct sales of natural gas to the State's industrial customers without a certificate of public convenience and necessity, and the pipeline brought a Commerce Clause challenge to the commission's action. The Court observed that

> "[a]ppellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in [the LDC's] over-all costs of service and its rates to customers whose only source of supply is [the LDC]. This clearly presents a situation of . . . vital interest to the State of Michigan." *Id.*, at 334.

In view of the economic threat that competition for large industrial consumers posed to gas service to small captive users, the Court again reaffirmed its longstanding doctrine upholding the States' power to regulate all direct in-state sales to consumers,

> even if such regulation resulted in an outright prohibition of competition for even the largest end users. *Id.*, at 336-337; see also *Panhandle-Indiana, supra* (upholding state regulation of direct sales to large industrial users as not pre-empted by the NGA or precluded by the dormant Commerce Clause).

519 U.S. at 305-06.

From the end of this quoted passage hangs footnote 14 of the Court's opinion, which has considerable significance for defendants because it addresses the principal circuit court cases relied upon by Midwestern and FERC on the issue of jurisdiction over bypass arrangements. The Supreme Court wrote:

> Under today's altered market structure, *see supra*, at 283-85, several Courts of Appeals have held that the NGA confers jurisdiction on FERC, rather than the States, to regulate such bypass arrangements for supplying gas to large industrial consumers when the sale of gas itself occurs outside the State and an interstate pipeline merely transports the gas to the industrial consumer for delivery in-state. *See Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1414-1422 (CA10 1992); *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1299-1301 (CA6 1989), *cert. denied*, 494 U.S. 1079, 108 L. Ed. 2d 937, 110 S. Ct. 1806 (1990); *Michigan Consolidated Gas Co. v. FERC*, 280

> U.S. App. D.C. 45, 883 F.2d 117, 121-122 (CADC 1989), *cert. denied*, 494 U.S. 1079, 108 L. Ed. 2d 937, 110 S. Ct. 1807 (1990). We express no view on the correctness of these decisions.

519 U.S. at 306 n.14.

Midwestern correctly points out that the Supreme Court did not actually consider in *Tracy* the correctness of those decisions cited in footnote 14. However, for present purposes -- deciding only whether the Indiana statutes authorizing jurisdiction over bypass arrangements are "flagrantly and patently" unconstitutional -- the footnote has some significance because the Supreme Court did not observe that the cited circuit court decisions are obviously correct in their efforts to distinguish the earlier *Panhandle* decisions based on the separation of the seller and transporter. It is not unreasonable to read footnote 14 as an invitation for further consideration of the issue flagged by the Court, especially coming at the end of a discussion of the two *Panhandle* decisions and the important interests states have in regulating direct sales to large industrial customers that bypass local distribution companies, regardless of whether seller and transporter are separate entities.[9]

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[9] Defendants argue further that FERC's approach to bypass arrangements that involve separate sellers and transporters reduces to mere surplusage the specific exemption in the Natural Gas Act for "the local distribution of natural gas." 15 U.S.C. §717(b). Midwestern essentially concedes as much, but it relies on evidence that Congress in fact intended the phrase to be surplusage. *See* H.R. Rep. No. 75-709, at 3 (1st Sess. 1937) (phrase "the local

From a practical standpoint, moreover, it appears that Midwestern's and FERC's logic would extend from the situation here, in which the operator of an interstate pipeline is delivering gas directly to two large industrial customers, to similar deliveries to three, or four, or a hundred industrial customers within a state. Midwestern could be building taps and individual pipelines for all of those customers all over the state. Yet, under Midwestern's and FERC's reasoning, all that activity would not amount to "the local distribution of natural gas," at least as long as the seller and the transporter were separate corporations. As the Supreme Court observed in the midst of its discussion of the *Panhandle* cases in *Tracy*, however, "notwithstanding the national regulatory revolution, Congress has done nothing to limit its unbroken recognition of the state regulatory authority that has created *and preserved* the local monopolies." 519 U.S. at 304-05 (emphasis added).

Midwestern's and FERC's reasoning opens a potentially huge breach in those state-regulated local

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distribution of natural gas" was "not actually necessary," but because similar language had been included in previous bills, it was left in the act to avoid "the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act"), quoted with approval in *Federal Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621, 637 n.14, 32 L. Ed. 2d 369, 92 S. Ct. 1827 (1972). SIGECO points out that the House Report simply assumed that all distribution would be associated with a sale, so that it offers little guidance as to how the act should be applied when sale and distribution are separated, as they sometimes have been in recent years.

monopolies, and it allows the interstate pipeline companies to skim what the Supreme Court called the "cream" of the business. *Panhandle-Indiana,* 332 U.S. at 521. Basing such a dramatic change in the regulatory jurisdiction over bypass arrangements on the difference between having one corporation handle both the sale and the delivery (which indisputably gives a state jurisdiction) and dividing the sale and delivery transactions between two separate corporations (which could even be two wholly-owned subsidiaries of the same parent corporation) does not appear to be the only reasonable reading of the Natural Gas Act. After all, the Act was intended only to fill a regulatory gap, not to replace existing state regulatory jurisdiction with federal power.

The Supreme Court's understanding of the Natural Gas Act as a measure to fill a regulatory gap rather than to exercise the full scope of the federal commerce power also answers Midwestern's reliance on the Supreme Court's statement in *Maryland v. Louisiana* that: "Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." 451 U.S. at 755; *see also, e.g., Cascade Natural Gas,* 955 F.2d at 1417, quoting *Maryland v. Louisiana*. The Supreme Court's observation in *Maryland v. Louisiana* was part of the reasoning supporting its conclusion that Louisiana's "First-Use Tax" on natural gas discriminated against interstate commerce. The Court was not addressing in that case the Natural Gas Act's boundary between federal and state jurisdiction. If Congress chose to exercise the full scope of its Commerce Clause power, there is little doubt that Congress could choose to regulate gas sales and transportation from origin to the ultimate consumer. That is evident from the fact that, both prior to and under the Natural Gas Act, the Court

has allowed states to regulate some matters that the Court specifically identified as involving interstate commerce in natural gas. *See, e.g., Panhandle-Michigan*, 341 U.S. at 333-35; *Panhandle-Indiana,* 332 U.S. at 512, 514-16; *Pennsylvania Gas Co. v. Public Service Comm'n,* 252 U.S. 23, 31, 64 L. Ed. 434, 40 S. Ct. 279 (1920).

The central point, however, is that Congress did not choose to exercise its full Commerce Clause power when it enacted the Natural Gas Act. It chose instead to exercise its power only where the Supreme Court had held that states could not act. Thus, one might decide a jurisdictional question under the act by asking whether, if FERC did not exist at all, a state government could regulate the transaction or equipment in question. If the answer is yes, then federal authority is not needed. If the answer is no, then the federal agency would have jurisdiction.

Under this approach, there is little doubt that a state would have the authority to regulate the delivery of gas to an end-user in that state, regardless of where the gas was purchased. The Supreme Court said as much in a case decided before the Natural Gas Act, *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298, 68 L. Ed. 1027, 44 S. Ct. 544 (1924), where the Court distinguished between distribution of gas for resale, which was held beyond the reach of state regulation, and distribution of gas to end-users:

> The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; *and this is so whether the local distribution be*

> *made by the transporting company or by independent distributing companies*. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance.

265 U.S. at 309 (emphasis added). The emphasized language, which was available to Congress when it enacted the Natural Gas Act, indicates that distribution directly to an end-user is "local distribution" that the end-user's state may regulate, even if the transaction originated in interstate commerce.[10]

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[10] A state's power to apply non-discriminatory laws to a local delivery of a product purchased in another state is by now well-established in Commerce Clause jurisprudence generally, although it was the subject of controversy in the 19th century, often debated then in terms of the "original package" doctrine. Under the original package doctrine, a state that outlawed the manufacture and sale of alcoholic beverages, for example, was barred by the Commerce Clause from regulating, prohibiting, or taxing local sales of alcoholic beverages brought from other states, so long as the beverages remained sealed in their "original packages." *See Leisy v. Hardin*, 135 U.S. 100, 34 L. Ed. 128, 10 S. Ct. 681 (1890) (applying original package doctrine to bar enforcement of state law barring sale of alcoholic beverages); *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 441-42, 6 L. Ed. 678 (1827) (striking down state tax on importers of all kinds of goods and providing source of "original package" doctrine); *see generally Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 852 (7th Cir. 2000) (reviewing history of "jettisoned" original package doctrine for purposes of interpreting Twenty-first Amendment). The original package doctrine was dead long before it was formally overruled in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 46 L. Ed. 2d 495, 96 S. Ct. 535 (1976). It is clear that a state may apply non-discriminatory

Ultimately, however, in deciding whether *Younger* abstention is appropriate in this case, this court should not decide which side should prevail in the underlying debate over regulatory jurisdiction. The issue presented by Midwestern's argument is only whether the result of that debate is so clear that any effort by the Indiana Commission to exercise jurisdiction over Midwestern's bypass arrangements with GPC and Scepter would be "flagrantly and patently" unconstitutional. As the foregoing discussion should indicate, that question is easy to answer, and the answer is no.

Jurisdictional debates over gas regulation under the Commerce Clause and the Natural Gas Act have a long and complex history. The circuit courts cited by Midwestern have acknowledged the difficulty of the question and have recognized that their decisions were necessarily in tension with at least some Supreme Court opinions, just as the opposite result would produce similar tension with other Supreme Court opinions.

In this court's view, the Indiana Commission and Indiana courts are free to evaluate the authorities and the arguments and to make their own decision about whether Indiana may exercise jurisdiction over these bypass arrangements. Any party disappointed with the state's resolution of any issue of federal law is free to seek review

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laws to tax, regulate, or prohibit transactions or activities within its borders even if they originate in interstate commerce. *See, e.g., McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 84 L. Ed. 565, 60 S. Ct. 388 (1940) (upholding tax on sale of coal shipped into taxing state by seller).

from the Supreme Court of the United States.

2. *Dormant Commerce Clause*

Midwestern also argues that the Indiana statutes regulating bypass arrangements "flagrantly and patently" violate the dormant Commerce Clause because they discriminate against interstate commerce. The standard for the unconstitutionality of a state statute to invoke this exception to *Younger* is high. The challenged statute must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger*, 401 U.S. at 53-54, quoting *Watson v. Buck*, 313 U.S. 387, 402, 85 L. Ed. 1416, 61 S. Ct. 962 (1941); *accord*, *Moore*, 442 U.S. at 424; *Juidice*, 430 U.S. at 338.

Midwestern bases its dormant Commerce Clause argument on Ind. Code §8-1-2-87.6.[11] Section 87.6(a)

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[11] Section 87.6 provides in full:

(a) Except as provided in this section, the production, gathering, sale, or transportation of Indiana produced natural gas is exempt from this chapter.

(b) Any person, corporation, or other entity engaged in the production, gathering, sale, or transportation of natural gas produced in Indiana may petition the commission to:

(1) require a gas utility certified under section 86 or 87 of this chapter to purchase or transport Indiana produced natural gas owned by the petitioning entity; and

(2) set the rates for the purchase or transportation of that gas.

(c) Upon receiving a petition under subsection (b), the commission

effectively excludes "Indiana produced natural gas" from the terms of Sections 87 and 87.5. Midwestern contends this exclusion shows that Sections 87 and 87.5 embody "flagrantly and patently" unconstitutional discrimination against interstate commerce, which should justify in turn an exception to *Younger* abstention. The court disagrees.

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may order the gas utility to transport or purchase the gas, and shall conduct a public hearing to set the purchase or transportation rates. The commission may only require the purchase or transportation of Indiana produced natural gas that:

(1) is of pipeline quality and reliability; and

(2) is to be delivered to a facility of the transporting or purchasing local distribution company that has adequate capacity to accept and transport the volume of gas involved.

The commission shall provide notice of the hearing in accordance with IC 8-1-1-8. The commission shall prescribe the form of the petition, the procedures for the hearing, and the parties to whom notice is to be sent.

(d) If the sale of Indiana produced natural gas to an end use consumer for consumption in the franchise territory of a gas utility with less than five thousand (5,000) customers detrimentally affects the other end use consumers in the utility's franchise territory, the utility may petition the commission to require the seller to instead sell the gas to that utility at a rate and under terms and conditions set by the commission.

(e) Any interested party may appear at a hearing conducted under subsections (c) and (d) either in person or by attorney and offer evidence in support of or in opposition to the petition. The commission may conduct an investigation and introduce any evidence obtained as a result of the investigation at the hearing.

(f) The commission may adopt rules under IC 4-22-2 to implement this section.

Read as a whole, Section 87.6 authorizes the Indiana Commission to impose extensive regulatory controls over "Indiana produced natural gas" and those who produce, gather, sell, or transport it. The statute authorizes the Commission to require public utilities in Indiana to buy Indiana-produced gas if certain conditions are met. Any such order that barred a utility from buying out-of-state gas would raise questions under the dormant Commerce Clause, of course, at least if a producer or seller of out-of-state gas raised the question. However, there is no evidence that the Commission has issued any such order. In addition, the defendants contend that Section 87.6 is essentially an exercise of jurisdiction over Indiana-produced gas that complements federal regulation over interstate aspects of the gas business. That argument is not frivolous. This court cannot decide on the sparse record in this case that Section 87.6 has had any effects at all, let alone that it violates the Constitution so "flagrantly and patently" that *Younger* abstention would not be appropriate here.

Defendants also argue that, if Section 87.6 presents any Commerce Clause problem at all, it is because it favors producers of Indiana gas over producers of gas elsewhere. Midwestern is not a producer or seller of gas. It merely transports gas, and it has not shown how Section 87.6 places it at any disadvantage.

Finally, all Indiana statutes are subject to a severability clause. See Ind. Code §1-1-1-8; *Alliance for Clean Coal v. Bayh*, 888 F. Supp. 924, 937 (S.D. Ind. 1995), *aff'd*, 72 F.3d 556 (7th Cir. 1995). Even if Section 87.6 were deemed unconstitutional or were deemed to render Sections 87 and/or 87.5 unconstitutional (which are questions this court need not

decide for purposes of deciding whether *Younger* abstention is appropriate), the Indiana courts could easily cure the problem by severing the offending provision and applying Sections 87 and 87.5 regardless of the source of the gas in question. That possibility weighs heavily in favor of *Younger* abstention so that the Indiana courts may address that issue of state law. The mere existence of Section 87.6 in the Indiana Code does not mean that Sections 87 and 87.5 "flagrantly and patently" violate the dormant Commerce Clause.

3. *The Proposed "Relitigation" Exception to Younger Abstention*

In an argument related to its assertion that the Indiana laws are "flagrantly and patently" unconstitutional, Midwestern argues that the court should recognize an exception to *Younger* abstention where the state proceedings in question amount to an effort to relitigate rights already decided through federal channels. Midwestern relies on FERC's explicit approval of the bypass arrangements with both GPC and Scepter.

The short answer to this argument is that the Indiana Commission was not a party to the FERC proceeding. It is not bound by any conclusions FERC reached about the boundary between FERC's and the Indiana Commission's jurisdictions. The Indiana Commission has the authority to pursue enforcement proceedings on its own initiative. See Ind. Code §§8-1-2-58 to -60 & -115. Thus, even if Midwestern were correct in saying that SIGECO should not be allowed to bring a collateral challenge to FERC's ruling, the Indiana Commission would be entitled to pursue the enforcement actions pending before it. *See* generally *Kerr-McGee*

Chemical Corp. v. Hartigan, 816 F.2d 1177, 1180 (7th Cir. 1987) (affirming denial of injunction to bar state court action brought by state; prior federal court decision had no preclusive effect where state had participated in case only as an amicus curiae but was not a party).[12]

Midwestern also relies heavily on *Williams Natural Gas Co. v. Oklahoma City*, 890 F.2d 255 (10th Cir. 1989), to avoid *Younger* abstention. In *Williams Natural Gas*, an interstate pipeline company had sought FERC approval for a bypass arrangement with a large industrial customer. The local distribution company had objected before FERC, arguing that FERC lacked jurisdiction and that state approval was required. FERC disagreed and issued a certificate under federal law authorizing the construction of a 12-mile pipeline extension to provide the bypass service. In the meantime, the local distribution company pursued an action in state court that resulted in an injunction against Williams Natural Gas prohibiting construction of the pipeline extension. Williams Natural Gas then sought a federal injunction against the state court action and injunction. The federal district court denied the injunction and held that it lacked jurisdiction to review the state court's decision because of the *Rooker-Feldman* doctrine. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413,

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[12] The court expresses no view on whether certification proceedings before FERC are legislative in nature (like Indiana proceedings on necessity certificates), so that issue preclusion would not be applicable even to parties. *See United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422, 16 L. Ed. 2d 642, 86 S. Ct. 1545 (1966); *Meyer v. Rigdon*, 36 F.3d 1375, 1379-80 (7th Cir. 1994) (administrative decisions will be given issue-preclusive effect only if the agency acted in a judicial capacity).

415-16, 68 L. Ed. 362, 44 S. Ct. 149 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983).

The Tenth Circuit reversed and directed the district court to enjoin enforcement of the state court injunction. 890 F.2d at 264. The Tenth Circuit concluded that the local distribution company's exclusive avenue for challenging FERC's issuance of a certificate was the judicial review provision of the Natural Gas Act itself, in 15 U.S.C. §717r. The state court action was therefore an improper collateral attack on the FERC certificate.

Williams Natural Gas is different from this case in one important respect. In *Williams Natural Gas*, the state regulatory body was not a party to the FERC proceedings, nor was it a party to the state or federal court litigation that ultimately resulted in an injunction against further litigation. In this case, of course, the Indiana Commission was not a party to the FERC proceedings, and the Indiana Commission itself is the governmental body pursuing the issue of enforcing Indiana law as it applies to Midwestern and its bypass customers. In *Williams Natural Gas*, therefore, the Tenth Circuit was directing entry of an injunction against collateral litigation by a party who had appeared before FERC and had lost. The court had no occasion to address in that case whether state utility regulators could be barred from pursuing their own investigation and enforcement proceeding because of the result of a FERC proceeding in which the state regulators played no part. In this case, the Indiana Commission is authorized by law to investigate and pursue on its own initiative possible violations of Indiana law relating to public utilities. This court sees no support for Midwestern's

bold assertion that, in the dual federal-state system of regulating the natural gas business, state regulators must either intervene before FERC or passively and quietly accept FERC's decisions.[13]

Conclusion

Accordingly, pursuant to the principles of comity and federalism embodied in *Younger v. Harris*, the court grants defendants' motions to dismiss. The court does not reach the other abstention doctrines argued by the Commissioners. All other pending motions are denied as moot. Final judgment shall be entered.

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[13] Midwestern has also framed essentially the same argument in terms of issue preclusion, arguing that SIGECO should be bound by the doctrine of issue preclusion because it raised the same arguments on the merits before FERC, lost in that forum, and chose not to appeal to a federal court of appeals. This court has not tried to reach any conclusions on the question of issue preclusion as applied to SIGECO because, in any event, there would be no basis for applying issue preclusion to the Indiana Commission. The Commission was not a party to the FERC proceeding. Midwestern has not offered any basis for concluding that a state commission may be barred by the doctrine of issue preclusion from making its own decision on a matter that FERC has decided in a proceeding to which the state commission was not a party.

In addition, even SIGECO did not participate in the FERC proceedings concerning Midwestern's bypass arrangements with Scepter. There appears to be no basis for barring the Indiana Commission from pursuing the two docketed matters relating to the Scepter arrangement.

So ordered.

Date: November 13, 2000

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana